NAVAL WAR COLLEGE

# International Law Situations

WITH SOLUTIONS AND NOTES

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# PREFACE

The discussions upon international law were, as in recent years, conducted under the auspices of the Naval War College authorities by George Grafton Wilson, LL. D., professor of international law in Harvard University, who also drew up the notes which are published in the present volume. The discussion aimed to consider the situations from the point of view of the belligerent on the offensive, the belligerent on the defensive, and the neutral.

Criticisms of the material presented and suggestions as to topics and situations that should be discussed will be welcomed by the Naval War College.

HARRIS LANING,
*Rear Admiral, U. S. Navy,*
*President Naval War College.*

JUNE 20, 1930.

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# INTERNATIONAL LAW SITUATIONS WITH SOLUTIONS AND NOTES

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## Situation I

## NEUTRALITY AND VESSELS

States X and Y are at war. Other states are neutral. State X is a party to the Washington treaty limiting naval armament of 1922. State Y is not a party to this treaty.

(*a*) The *Swan*, a merchant vessel lawfully flying the flag of state X enters a port O of the United States where it remains one week discharging and loading cargo. The decks of the *Swan* have been strengthened for the mounting of 5-inch guns, and the *Swan* from time to time communicates by radio with a division of the fleet of state X to the north and with a division of the same fleet to the south of port O.

(*b*) The *Sparrow*, a merchant vessel lawfully flying the flag of state Y enters port O of the United States and the owner contracts with a shipbuilder for the strengthening of the decks of the *Sparrow* so that she might mount a 5-inch gun and the same shipbuilder has, since war was declared, made contracts with a citizen of state X and with a citizen of state Y to build for each a merchant vessel with decks of such strength as to mount a 5-inch gun and also to build for each a merchant vessel of such construction as to make easy the transformation of these vessels to aircraft carriers.

(*c*) Merchant vessels of state X and of state Y having decks strengthened to mount 5-inch guns and adapted for

launching aircraft appear at opposite ends of the Panama Canal for the purpose of passing through and maintain that even if regarded as vessels of war they would have the same privileges as in the Suez Canal; and vessels of war of state X enter the Gulf of Fonseca and without going within 3 miles of land await several days the arrival of other vessels of war and auxiliaries. Meantime aircraft from vessels of war of state X fly regularly over the state of Panama between the fleet of state X in the Caribbean Sea and the vessels in the Gulf of Fonseca.

State Y protests against the sojourn of the *Swan* at port O. (Under (*a*) above.)

State X protests against the carrying out of the contract on the *Sparrow* at port O and the shipbuilder is in doubt as to the lawfulness of fulfilling his contracts with the citizens of states X and Y. (Under (*b*) above.)

The authorities at Panama desire to conform to the laws of neutrality. (Under (*c*) above.)

What should be done in each case? Why?

SOLUTION

(*a*) The *Swan* may, as a merchant vessel, lawfully enter port O of the United States and discharge and load cargo, but the communication by radio with divisions of the fleet of state X is a violation of the neutrality of the United States and thereupon the radio apparatus should be dismantled and the *Swan* should be interned.

(*b*) The contract for stiffening the decks of the *Sparrow* should not be executed because it would be in part an adaptation for use in war, and the contracts with states X and Y should not be executed.

(*c*) The vessels appearing at opposite ends of the Panama Canal have not the same privileges as in the Suez Canal and should be allowed to pass through but each should, after passing through, be detained till the other has passed through in order that the departure of one may not be delayed by the passage of the other.

The Gulf of Fonseca is a territorial gulf and therefore not open to the vessels of state X.

The aircraft from vessels of war of state X may not lawfully fly over Panama.

NOTES

*General.*—States X and Y being at war are under obligation to observe the law of war and the treaties to which they are parties. Other states being neutral are under similar obligations to observe the laws of neutrality and the treaties to which they are parties.

The plenipotentiaries at the Washington Conference on the Limitation of Naval Armament, 1921–22, state in the preamble of the treaty, signed February 6, 1922, and subsequently ratified by the five powers, that—

> Desiring to contribute to the maintenance of the general peace, and to reduce the burdens of competition in armament;
>
> Have resolved, with a view to accomplishing these purposes, to conclude a treaty to limit their respective naval armament. (43 U. S. Stat., Part. II, p. 1655.)

Chapter I contains the general provisions relating to the limitation of naval armament, and these are set forth in Articles I to XX. It may therefore be presumed that the contractual articles of the treaty are for the purpose stated in Article I:

> The contracting powers agree to limit their respective naval armament as provided in the present treaty. (Ibid. p. 1657.)

The categories mentioned in articles which follow are capital ships, aircraft carriers, noncapital ships, merchant ships, fortifications, and naval bases.

(*a*) *Use of radio.*

*Sojourn in neutral port.*—In situation I the *Swan* enters a neutral port as a merchant vessel of state X and proceeds to discharge and load cargo. The decks of the *Swan* have been stiffened for mounting 5-inch guns. This, according to Article XIV, is of the nature of

preparation "for the installation of armaments for the purpose of converting" such a vessel into a vessel of war and is permitted in time of peace. While the United States might make inquiry to ascertain at what time the stiffening of the decks of the *Swan* took place, the United States is under no obligation to do this nor does it necessarily know the strength of the decks. The stiffening of the decks or other equipment of a vessel may be for the purpose of conversion of the vessel into a vessel of war, but the vessel is not yet converted and for the United States is a merchant vessel engaged in lawful commerce.

*General regulation of radio.*—The *Swan* from time to time communicates by radio with a division of the fleet of state X. There arises, therefore, questions as to the legality of such act.

During the World War the prohibition of the use of radio while not by identic rules was usually by rules based upon articles 3, 5, 8, and 9 of Hague Convention V, 1907, and article 5 of Hague Convention XIII, which are as follows:

HAGUE CONVENTION V

ART. 3. Belligerents are likewise forbidden:

*a*. To erect on the territory of a neutral power a wireless telegraph station or any apparatus for the purpose of communicating with belligerent forces on land or sea;

*b*. To use any installation of this kind established by them before the war on the territory of a neutral power for purely military purposes, and which has not been opened for the service of public messages.

ART. 5. A neutral power must not allow any of the acts referred to in articles 2 to 4 to occur on its territory.

It is not bound to punish acts in violation of neutrality unless these acts have been committed on its own territory.

ART. 8. A neutral power is not bound to forbid or restrict the use on behalf of the belligerents of telegraph or telephone cables or of wireless telegraph apparatus belonging to it or to companies or private individuals.

ART. 9. Every measure of restriction or prohibition taken by a neutral power in regard to the matters referred to in articles 7 and 8 must be impartially applied by it to the belligerents.

A neutral power shall see to the observance of the same obligation by companies or private individuals owning telegraph or telephone cables or wireless telegraph apparatus.

HAGUE CONVENTION XIII

ART. 5. Belligerents are forbidden to use neutral ports and waters as a base of naval operations against their adversaries, and, in particular, to erect wireless telegraph stations or any apparatus for the purpose of communicating with belligerent forces on land or sea.

The rules were, in part, the result of events which had taken place during the Russo-Japanese War, 1904, which had shown the necessity of regulating the use of wireless telegraphy. The principles upon which the rules are based have, however, been recognized for a long time.

While freedom is allowed in some respects in the use of neutral waters greater than in the use of neutral land, the belligerent is equally bound to refrain from acts which, if knowingly permitted, would constitute a nonfulfillment of neutrality.

Article 25 of Hague Convention XIII, 1907, provides that—

A neutral power is bound to exercise such surveillance as the means at its disposal allow to prevent any violation of the provisions of the above articles in its ports or roadsteads or in its waters.

And article 26 provides:

The exercise by a neutral power of the rights laid down in the present convention can never be considered as an unfriendly act by one or the other belligerent who has accepted the articles relating thereto.

*United States radio order, August 5, 1914.*—President Wilson on August 5, 1914, issued the following order in regard to the use of radio:

Whereas proclamations having been issued by me declaring the neutrality of the United States of America in the wars now existing between various European nations; and

Whereas it is desirable to take precautions to insure the enforcement of said proclamations in so far as the use of radio communication is concerned;

It is now ordered, by virtue of authority vested in me to establish regulations on the subject, that all radio stations within the jurisdiction of the United States of America are hereby prohibited from transmitting or receiving for delivery messages of an unneutral nature, and from in any way rendering to any one of the belligerents any unneutral service during the continuance of hostilities.

The enforcement of this order is hereby delegated to the Secretary of the Navy, who is authorized and directed to take such action in the premises as to him may appear necessary. (1916 N. W. C. Int. Law Topics, p. 87.)

By a further Executive order of September 5, 1914, high-powered radio stations were taken under Government control in order that neutrality might be maintained.

*Action of other states.*—Norway and some other states had general rules relating to radio and published in time of peace. Other states issued regulations after the outbreak of war.

Norway had, in the Rules of Neutrality established in 1912, stated:

CHAP. IV. (1) It is forbidden belligerent powers to use ports or waters of the kingdom as bases for naval operations against their enemies.

It is especially forbidden to establish on the territory or in the territorial waters of the kingdom radio stations or any apparatus designed to serve as a means of communication with the belligerent forces whether on land or sea. (1917 N. W. C., Int. Law Documents, p. 186.)

While in August, 1914, the Argentine Government forbade vessels of belligerent powers to use their radio in jurisdictional waters except in case of distress, in October it was found necessary to make an additional order directing that "from the time they enter the jurisdictional waters of the Republic until they leave them, vessels of the belligerent powers shall keep their radiotelegraphic poles lowered and their stations closed." Later orders covered other details.

*Dismantling radio apparatus.*—As radio upon merchant vessels was, at the outbreak of the World War, a comparatively new equipment, the regulations for its use were not well established. States recognized the general obligations to maintain neutrality, but the specific responsibilities for radio were not defined.

On August 14, 1914, Chile issued rules concerning the surveillance of vessels in territorial waters of which paragraph 8 referred to radio:

> The use of radiotelegraphy is forbidden to all merchant vessels during their sojurn in the Chilean waters. To render this prohibition effective it will be convenient to dismantle the apparatus designed for this system of telegraphy. (1916 N. W. C., Int. Law Topics, p. 17.)

The instructions issued by Chile, October 14, were as follows:

> 1. All vessels provided with radio apparatus, without distinction of nationality, which navigate in our territorial waters or are at anchor in our ports are forbidden to use the said apparatus.
>
> 2. When arriving in a port or roadstead, these vessels ought to dismantle their antennæ, breaking their connection with the gear and apparatus, as soon as they have been received by the maritime authorities, who will personally see to the strict accomplishment of this order, by proceeding immediately to affix their seals and stamps on the doors, windows, skylights, and other ways of access to the place in which this apparatus is located.
>
> 3. All national or foreign vessels which remain in a port more than four days will remove their antennæ, which will be kept in the same place as the apparatus of the radio station, observing the same instructions for sealing the ways of access to this place.
>
> 4. The maritime authorities will report to the office of the director of maritime territory on the accomplishment of the present instructions, not forgetting that their nonaccomplishment may compromise the neutrality of the country. (Ibid., p. 18.)

An order of October 15, 1914, was somewhat more explicit:

> In addition to sealing and stamping the places in which radio apparatus is located, please order the lowering and disconnecting of the antennæ from the halyards and radio apparatus of all steamers with radio installations, upon arriving at Chilean ports.

Steamers that remain more than four days in port ought to deliver their antennæ to the maritime authorities until the day of their departure, giving account by telegraph to the office of this director. Simpson. (Ibid., p. 18.)

Colombia on July 14, 1915, took action to the following effect in regard to vessels:

The vessels belonging to belligerent States and lying in Colombian waters will continue to be subject to the supervision and to the inspection of the authorities of the Republic, and their apparatus will remain incapable of operation and paralyzed in a manner believed to be effective; and, if necessary, they will be transported to land, in whole or in part, as will be prescribed. (Ibid., p. 46.)

Guatemala on September 1, 1914, decreed:

That from this date all merchant vessels of the belligerent nations when in the territorial waters of Guatemala or upon entering into them shall dismantle their wireless installations during such time as they shall remain in these waters. Vessels not complying with these regulations shall be considered as armed ships, and orders shall be given them to leave Guatemalan waters in conformity to convention No. 13 of The Hague, 1907. (Ibid., p. 58.)

Uruguay made regulations in regard to the use of radio from time to time and on October 20, 1914, prescribed:

No use can be made of apparatus installed on vessels lying in the ports or territorial or jurisdictional waters of the Republic, except in accord with the orders of the national authority. (Ibid., p. 113.)

*Radio in Colombia.*—In the early days of the World War complaints were made by the belligerents in regard to the use of radio stations in Colombia and in other South American States. The United Fruit Co. had before the war a station at Santa Marta, erected under a contract of July 19, 1911. By the terms of this contract the station was to be neutral, and might in case of foreign or domestic war be placed under Government supervision and censorship. The station at Cartagena was subject to like control. Owing to complaints and owing to the difficulty of securing expert censorship a resolution of September 11, 1914, stated:

The service of the radio station of Cartagena is temporarily suspended until by virtue of the cooperation of suitable experts the supervision and preventive censorship of the local authorities may be realized in the service of the station and in the transmission and delivery of its dispatches. As soon as suitable experts can be employed, who will render possible the preventive censorship and in this manner the neutrality of the Republic will in a measure be clearly guaranteed, the station can resume its service by submitting to the obligatory censorship and supervision. (1916 N. W. C., Int. Law Topics, p. 39.)

Later the Colombian Government wrote to its legation in Washington, as complaints had been received in regard to possible use of radio in different parts of Colombia:

We have no wireless stations on the Pacific coast.

As for the Atlantic, Cartagena radio station that belongs to a private company, the Government has a contract giving it full rights of inspection and censorship in case of war.

The British Legation made reclamations on the ground that there was no characterized expert, and the Government to comply with the legation's wishes closed the station.

Afterwards, the Government entered into an agreement with a professional expert, paid by the Government and put him at the head of the station, which was again opened.

The British Legation after some days asked the dismissal of the German employees in the station, and although the Government's expert is the only one who receives or transmits radiograms, it decided to dismiss and did dismiss foreign employees, and since then operates the station, handing its net produces [proceeds] to the company.*

No codes are admitted.

Now the British Legation considers that even plain words and phrases are suspect as they may be used with a conventional secret sense and on that new ground has asked the Government to close again the station.

But as the company has rights not to be overlooked, the Government can not comply with the Legation's wishes, still less when it has its own expert operating the station. This is the only pending question.

The British Legation informed that it feared Germans may be hidden in Urabá using occult stations. The Government made investigations at Cartagena, at Turbo and at Quibdó and found

an abandoned ship, the *Oscar*, of the Compania Bananera, with wireless apparatus out of use. A special official was sent to bring back the apparatus.

The British Legation tendered its thanks to the Government for its zeal. (1914 U. S. For. Rel., Sup. p. 686.)

*Secretary of State to chairman Senate Committee on Foreign Relations.*—The attitude of the Secretary of State of the United States as to control of radio was set forth in reply to a letter of Senator Stone which raised question as to censorship of radio messages. The Secretary said:

> The reason that wireless messages and cable messages require different treatment by a neutral government is as follows:
>
> Communications by wireless can not be interrupted by a belligerent. With a submarine cable it is otherwise. The possibility of cutting the cable exists, and if a belligerent possesses naval superiority the cable is cut, as was the German cable near the Azores by one of Germany's enemies and as was the British cable near Fanning Island by a German naval force. Since a cable is subject to hostile attack, the responsibility falls upon the belligerent and not upon the neutral to prevent cable communication.
>
> A more important reason, however, at least from the point of view of a neutral government, is that messages sent out from a wireless station in neutral territory may be received by belligerent warships on the high seas. If these messages, whether plain or in cipher, direct the movements of warships or convey to them information as to the location of an enemy's public or private vessels, the neutral territory becomes a base of naval operations, to permit which would be essentially unneutral.
>
> As a wireless message can be received by all stations and vessels within a given radius, every message in cipher, whatever its intended destination, must be censored; otherwise military information may be sent to warships off the coast of a neutral. It is manifest that a submarine cable is incapable of becoming a means of direct communication with a warship on the high seas. Hence its use can not, as a rule, make neutral territory a base for the direction of naval operations. (1914 For. Rel. Sup., p. VIII.)

*Commission of Jurists, 1923.*—While the rules drawn up by the Commission of Jurists in 1923 in regard to radio and aircraft have not been ratified and probably will not be ratified in their present form, they do enunciate the principles which may be expected to prevail.

Article 2 of these rules is as follows:

Belligerent and neutral powers may regulate or prohibit the operation of radio stations within their jurisdiction. (1924 N. W. C., Int. Law Documents, p. 100.)

In their report on this article the commission said:

Article 17 of the radio-telegraphic convention of 1912 enables states to regulate or prohibit the use of radio stations within their jurisdiction by rendering applicable to radiotelegraphy certain provisions of the international telegraphic convention of 1875. In particular it is articles 7 and 8 of that convention which enables such measures of control or prohibition to be taken. The object of article 2 is to make it clear that such rights subsist equally in time of war. (Ibid., p. 99.)

This report further says:

The legislation of a large number of powers, for instance, that of the powers represented in the commission, already provides for the prohibition of the use of radio installations on board vessels within their jurisdiction. In harmony with articles 5 and 25 of the convention concerning the rights and duties of neutral powers in maritime warfare (No. XIII of 1907), article 5 enacts the continuance of this régime in time of war and makes it obligatory for all mobile radio stations. (Ibid., p. 101.)

Upon these principles article 5 is based:

Belligerent mobile radio stations are bound within the jurisdiction of a neutral state to abstain from all use of their radio apparatus. Neutral governments are bound to employ the means at their disposal to prevent such use. (Ibid., p. 101.)

*Use of radio.*—While the use of radio by a merchant vessel may at times during war be essential for its safe and convenient navigation, it may at times be used for other purposes. In the case of the *Swan*, a merchant vessel of a belligerent in a neutral port, such use for safe navigation could not be affirmed. Communication with the fleet from a neutral port would be analogous to the use of the port as a base and would place the neutral under obligation to dismantle the radio and intern the *Swan*. The fact that the decks of the vessel are strengthened does not place the neutral under other obligations

than to use ordinary diligence, and the *Swan*, conducting itself in accord with neutral regulations, should be treated as a merchant vessel entitled to usual trading privileges.

SOLUTION

(*a*) The *Swan* may, as a merchant vessel, lawfully enter port O of the United States and discharge and load cargo; but the communication by radio with divisions of the fleet of state X is a violation of the neutrality of the United States, and thereupon the radio apparatus should be dismantled and the *Swan* should be interned.

(*b*) *Strengthening of decks, structural changes.*

*Fitting out by neutral.*—The laws of the United States, mindful of the treaty of 1871 with Great Britain, provide:

SEC. 11. Whoever, within the territory or jurisdiction of the United States, fits out and arms, or attempts to fit out and arm, or procures to be fitted out and armed, or knowingly is concerned in the furnishing, fitting out, or arming, of any vessel, with intent that such vessel shall be employed in the service of any foreign prince or state, or of any colony, district, or people, to cruise or commit hostilities against the subjects, citizens, or property of any foreign prince or state, or of any colony, district, or people, with whom the United States are at peace, or whoever issues or delivers a commission within the territory or jurisdiction of the United States, for any vessel, to the intent that she may be so employed, shall be fined not more than $10,000 and imprisoned not more than three years. And every such vessel, her tackle, apparel, and furniture, together with all materials, arms, ammunition, and stores, which may have been procured for the building and equipment thereof, shall be forfeited; one half to the use of the informer, and the other half to the use of the United States.

SEC. 12. Whoever, within the territory or jurisdiction of the United States, increases or augments, or procures to be increased or augmented, or knowingly is concerned in increasing or augmenting, the force of any ship of war, cruiser, or other armed vessel, which, at the time of her arrival within the United States, was a ship of war or cruiser or armed vessel, in the service of any foreign prince or state or of any colony, district, or people, or

belonging to the subjects or citizens of any such prince or state, colony, district, or people, the same being at war with any foreign prince or state or of any colony, district, or people, with whom the United States are at peace, by adding to the number of the guns of such vessel or by changing those on board of her for guns of a larger caliber or by adding thereto any equipment solely applicable to war, shall be fined not more than $1,000 and imprisoned not more than one year. (35 U. S. Stat., p. 1089.)

*Departure of vessel.*—It has been maintained that the burden of the conduct of war should not be shifted to neutrals but the principle of the exercise of "due diligence" by a neutral is at the same time admitted.

The British proclamation of neutrality of October 21, 1912, provided a penalty for any person who:

3. Equips any ship with intent or knowledge or having reasonable cause to believe that the same shall or will be employed in the military or naval service of any foreign state at war with any friendly state. (105 British and Foreign State Papers, [1912], pp. 163, 166.)

The proclamation also provided for the forfeiture of the ship.

*Neutrality proclamation, 1914.*—The neutrality proclamation of the United States of August 4, 1914, in paragraph 8, provided against—

Fitting out and arming, or attempting to fit out and arm, or procuring to be fitted out and armed, or knowingly being concerned in the furnishing, fitting out, or arming of any ship or vessel with intent that such ship or vessel shall be employed in the service of either of the said belligerents. (38 U. S. Stat., p. 1999.)

*Memorandum of September 19, 1914.*—The State Department memorandum of September 19, 1914, gave the rules that the Government of the United States would follow in determining the status of armed merchant vessels. Admitting that merchant vessels might carry armament when guns were not more than 6-inch caliber and not in the forward part of the vessel, with usual personnel and service as before the war, these rules prescribe that the speed of the ship be slow, and rule E, by implica-

tion, did not grant privileges to a vessel which might, by evidence available at the time, be converted into a ship of war.

E. The conversion of a merchant vessel into a ship of war is a question of fact which is to be established by direct or circumstantial evidence of intention to use the vessel as a ship of war.

This memorandum of the Department of State is in regard to defensively armed merchant vessels, and the British had assured the United States that these would not be used for attack.

No. 289.] BRITISH EMBASSY.

*Washington, August 25, 1914.*

(Received August 26.)

SIR: With reference to Mr. Barclay's notes, Nos. 252 and 259 of the 4th and 9th of August, respectively, fully explaining the position taken up by His Majesty's Government in regard to the question of armed merchantmen, I have the honour, in view of the fact that a number of British armed merchantmen will now be visiting United States ports, to reiterate that the arming of British merchantmen is solely a precautionary measure adopted for the purpose of defense against attack from hostile craft.

I have at the same time been instructed by His Majesty's Principal Secretary of State for Foreign Affairs to give the United States Government the fullest assurances that British merchant vessels will never be used for purposes of attack, that they are merely peaceful traders armed only for defense, that they will never fire unless first fired upon, and that they will never under any circumstances attack any vessel.

I have, etc.,

CECIL SPRING RICE.

(1914 For. Rel. Sup., p. 604.)

*Note to Germany, 1914.*—In a note to the American ambassador in Germany, November 7, 1914, the Acting Secretary of State said:

The practice of a majority of nations and the concensus of opinion by the leading authorities on international law, including many German writers, support the proposition that merchant vessels may arm for defense without losing their private character and that they may employ such armament against hostile attack without contravening the principles of international law.

The purpose of an armament on a merchant vessel is to be determined by various circumstances, among which are the number and position of the guns on the vessel, the quantity of ammunition and fuel, the number and sex of the passengers, the nature of the cargo, etc. Tested by evidence of this character the question as to whether an armament on a merchant vessel is intended solely for defensive purposes may be readily answered and the neutral government should regulate its treatment of the vessel in accordance with the intended use of the armament.

This Government considers that in permitting a private vessel having a general cargo a customary amount of fuel, an average crew, and passengers of both sexes on board, and carrying a small armament and a small amount of ammunition, to enjoy the hospitality of an American port as a merchant vessel, it is in no way violating its duty as a neutral. Nevertheless it is not unmindful of the fact that the circumstances of a particular case may be such as to cause embarrassment and possible controversy as to the character of an armed private vessel visiting its ports. Recognizing, therefore, the desirability of avoiding a ground of complaint, this Government, as soon as a case arose, while frankly admitting the right of a merchant vessel to carry a defensive armament, expressed its disapprobation of a practice which compelled it to pass upon a vessel's intended use, which opinion, if proven subsequently to be erroneous, might constitute a ground for a charge of unneutral conduct.

As a result of these representations no merchant vessels with armaments have visited the ports of the United States since the 10th of September. In fact, from the beginning of the European war but two armed private vessels have entered or cleared from ports of this country, and as to these vessels their character as merchant vessels was conclusively established. (9 A. J. I. L., Spec. Sup., p. 239.)

*United States law, 1917.*—By an act of June 15, 1917, the United States made provision for the enforcement of neutrality under Title V.

SEC. 2. During a war in which the United States is a neutral nation the President, or any person thereunto authorized by him, may detain any armed vessel owned wholly or in part by American citizens, or any vessel, domestic or foreign (other than one which has entered the ports of the United States as a public vessel), which is manifestly built for warlike purposes or has been converted or adapted from a private vessel to one suitable for warlike use, until the owner or master, or person having charge

of such vessel, shall furnish proof satisfactory to the President, or to the person duly authorized by him, that the vessel will not be employed by the said owners, or master, or person having charge thereof, to cruise against or commit or attempt to commit hostilities upon the subjects, citizens, or property of any foreign prince or state, or of any colony, district, or people with which the United States is at peace, and that the said vessel will not be sold or delivered to any belligerent nation, or to an agent, officer, or citizen of such nation, by them or any of them, within the jurisdiction of the United States, or, having left that jurisdiction, upon the high seas. (40 U. S. Stat., pp. 217, 221.)

*General provisions.*—After the *Alabama* case was decided the principle of obligation to use due diligence to prevent the outfitting of vessels for use in war came to be more and more strictly interpreted. It has become customary to insert in proclamations of neutrality the rules of the treaty of Washington, 1871, as follows:

ART. VI. A neutral government is bound—

First, to use due diligence to prevent the fitting out, arming, or equipping, within its jurisdiction, of any vessel which it has reasonable ground to believe is intended to cruise or to carry on war against a power with which it is at peace; and also to use like diligence to prevent the departure from its jurisdiction of any vessel intended to cruise or carry on war as above, such vessel having been specially adapted, in whole or in part, within such jurisdiction to warlike use.

Secondly, not to permit or suffer either belligerent to make use of its ports or waters as the base of naval operations against the other, or for the purpose of the renewal or augmentation of military supplies or arms or the recruitment of men.

Thirdly, to exercise due diligence in its own ports and waters and, as to all persons within its jurisdiction, to prevent any violation of the foregoing obligations and duties. (17 U. S. Stat., pp. 863, 865.)

There may be an offense under the Criminal Code of the United States, article 11, even if the vessel be not "armed or manned for the purpose of committing hostilities before she leaves the United States, if it is the intention that she be so fitted subsequently." (The City of Mexico (D. C. 1886), 28 Federal Reporter 148.)

*Armed merchant vessels.*—Few practices in naval warfare have been the subject of more diverse opinions in recent years than the arming of merchant vessels. For a time after privateering was declared abolished in the declaration of Paris, 1856, it was thought that the practice was at an end. Auxiliary vessels were soon suggested as avoiding the evils of privateering, as they would be under government control in time of war. Systems of subsidies established a measure of government right, which might extend to appropriation in time of war.

The general arming of merchant vessels would, however, make effective government control through trained naval personnel impracticable, unless the regular naval personnel should be greatly reduced. Without such control the use of armament would be by private direction. It would be difficult for private persons to distinguish between offensive and defensive acts. A powerful gun might in itself be a temptation for a patriotic private citizen to try it upon an enemy public vessel which he deemed inferior. Sometimes the arms have been furnished by the government, but the responsibility for the use of the arms has not been assumed. It is not always easy to argue that the arming is to prevent or in anticipation of an unlawful attack by an enemy vessel of war, for the vessel of war is under the same obligation to observe the law as is the merchant vessel. The old arming against privateers, pirates, sea marauders, etc., is not supported as necessary at present. Practically, the only purpose would be arming against submarines, and the effectiveness of this is now questioned by some, and by others the arming regarded as an evidence of an intent to engage in hostile operations, which should place the armed vessel in the category of vessels of war, even though the intent is to engage only a particular class of vessel. For though a small vessel of war with guns of short range does not intend to engage a capital vessel of

war of long-range guns, this intent does not remove the small vessel from the category of vessels of war. It is therefore maintained with considerable force that intent can not be determined, while armament is an ascertainable fact, which being present only in time of war must be for purposes of war, and that the size of the projectile or the part of the vessel from which it is fired should not protect the vessel or give it special privileges.

In spite of such arguments the practice in the World War, 1914–1918, sanctioned the arming of merchant vessels, and neutrals with few exceptions accorded armed merchant vessels privileges in their ports.

The submarine had for some time before the outbreak of the war of 1914–1918 formed an integral part of the naval forces of many states; it is a vessel used for military offense and comes under the general term of a "ship of war." The functions and duties of warships in belligerent operations had been settled by the customary law of nations, and there can be no doubt that these principles should apply to submarine as to surface ships. (Higgins in eighth edition, Hall, Int. Law, p. 627.)

Hall had said:

By some writers it is asserted that a noncommissioned ship has also a right to attack. If there was ever anything to be said for this view, and the weight of practice and of legal authority was always against it, there can be no question that it is too much opposed to the whole bent of modern ideas to be now open to argument. There is no such reason at sea as there is on land for permitting ill-regulated or unregulated action. On the common ground of the ocean a man is not goaded to leave the noncombatant class, if he naturally belongs to it, by the peril of his country or his home. Every one's right to be there being moreover equal, the initiative in acts of hostility must always be aggressive; and on land irregular levies only rise for defence, and are only permissible for that purpose. It is scarcely necessary to add that noncommissioned ships offer no security that hostilities will be carried on by them in a legitimate manner. Efficient control at sea must always be more difficult than on land; and if it was found that the exercise of due restraint upon privateers was impossible, *a fortiori*, it would be impossible to prevent excesses from being indulged in by noncommissioned captors. (Ibid., p. 630.)

*Article XIV.*—The treaty of 1922 limiting naval armament in Article XIV prohibits preparation for "installation of warlike armament for the purpose of converting" merchant ships into vessels of war "other than the necessary stiffening of decks." The French form of Article XIV might be somewhat more liberally interpreted than the English form which was the original form proposed to the conference. It was not intended to modify that form and the meaning of the French and English may be considered as the same, particularly as in Article XI the English expression "other than" is translated into French as "en dehors" while in Article XIV the same English expression is translated "toutefois."

Further, these preparations mentioned in Article XIV are preparations which by terms of that artitcle are limited to the "time of peace," and certainly if made in time of war, the preparation would be presumed for war purposes.

It should also be noticed under Article XI that while limitation to 10,000 tons is prescribed for construction or acquisition of vessels of war other than capital ships and aircraft carriers, no such tonnage limitation is prescribed for auxiliary vessels "not taken in time of peace under government control for fighting purposes." Article XIV, however, provides for preparation of the merchant marine in time of peace for mounting guns, not exceeding 6-inch caliber, without regard to the tonnage, speed, or other character of the merchant ship. There is no limitation upon the number of guns or their location. Similarly, there is not provision that these guns shall be used for defensive purposes only, but on the other hand, the equipment is stated to be for "converting such ships into vessels of war," the sole limitation being that the preparation "in time of peace" be for "guns not exceeding 6-inch caliber." Additional stiffening of decks would undoubtedly be possible during war and a fast and large

merchant marine might become a very effective naval auxiliary force as vessels of war.

This Article XIV implies that the arming of merchant ships for conversion is to be continued in practice and raises question as to the obligation of a neutral when a vessel having its decks strengthened for 6-inch guns is within its ports.

Article 17 of Hague Convention XIII relates to ships of war, but in time of war might be regarded as applying equally to vessels which would evidently be ships of war.

> In neutral ports and roadsteads belligerent ships of war can carry out only such repairs as are absolutely necessary to render them seaworthy, and can not add in any manner whatsoever to their fighting force. The neutral authorities shall decide what repairs are necessary, and these must be carried out with the least possible delay.

*Neutral obligation.*—The rules of the treaty of Washington, 1871, have strongly influenced the attitude toward neutral obligation. These rules were before The Hague peace conferences and article 8 of Convention XIII of the 1907 conference is a modification of the rule of 1871, as follows:

> A neutral government is bound to employ the means at its disposal to prevent the fitting out or arming of every vessel within its jurisdiction which it has reason to believe is intended to cruise, or engage in hostile operations, against a power with which that government is at peace. It is also bound to display the same vigilance to prevent the departure from its jurisdiction of every vessel intended to cruise, or engage in hostile operations, which has been, within the said jurisdiction, adapted, entirely or in part, for use in war.

While the implication is that the neutral must weigh the intent, " the fitting out and arming " or the adapting for use in war would be the evidence first considered. In this article 8, vigilance is to be displayed to prevent the " departure from its jurisdiction of every vessel intended to cruise, or engage in hostile operations, which has been, within the said jurisdiction, adapted, entirely or in part for use in war."

Article 8 of Hague Convention XIII specifically prohibits against "fitting out or arming" of a vessel of war "entirely or in part" and enjoins the neutral government to use "the means at its disposal" to prevent the departure of any vessel intended for use in war.

Article XIV clearly implies that in time of war the stiffening of the decks of a merchant vessel of a belligerent for the "installation of warlike armaments" would probably be regarded as with purpose of converting such vessel into a vessel of war and there is no reservation which would limit the use of such vessel to defensive purposes. This Article XIV states that "the necessary stiffening of decks for mounting of guns not exceeding 6-inch caliber" is as an exception among the preparatory installations which in time of peace may be made for conversion of merchant vessels into vessels of war.

SOLUTION

(*b*) The contract for stiffening the decks of the *Sparrow* should not be executed because it would be in part an adaptation for use in war, and the contracts with states X and Y should not be executed.

(*c*) *Passage of Panama Canal, aircraft over Panama.*

*Report of Commission of Jurists, 1923.*—The Commission of Jurists appointed under the provision of the resolution of the Conference on the Limitation of Armament, February 4, 1922, reported on February 19, 1923. Article 12 of this report was as follows:

> In time of war any state, whether belligerent or neutral, may forbid or regulate the entrance, movement, or sojourn of aircraft within its jurisdiction. (1924 N. W. C., Int. Law Documents, p. 113.)

Of this article the report says:

> In time of peace many states are subject to treaty obligations requiring them to allow aircraft of other states to circulate in the air space above their territory. In time of war a state must

possess greater freedom of action. Article 12, therefore, recognizes the liberty of each state to enact such rules on this subject as it may deem necessary. (Ibid., 113.)

Further this same report says:

To avoid any suggestion that it is on the neutral government alone that the obligation is incumbent to secure respect for its neutrality, article 39 provides that belligerent aircraft are under obligation to respect the rights of neutral powers and to abstain from acts within neutral jurisdiction which it is the neutral's duty to prevent.

Other rules embodying principles analogous to those for war on land or on sea were drafted but these have not been ratified.

*Treaties on Panama Canal.*—By the treaty of 1901 between the United States and Great Britain it was provided in Article III:

The United States adopts, as the basis of the neutralization of such ship canal, the following rules, substantially as embodied in the convention of Constantinople, signed the 28th October, 1888, for the free navigation of the Suez Canal, that is to say:

1. The canal shall be free and open to the vessels of commerce and of war of all nations observing these rules, on terms of entire equality, so that there shall be no discrimination against any such nation, or its citizens or subjects, in respect of the conditions or charges of traffic, or otherwise. Such conditions and charges of traffic shall be just and equitable.

2. The canal shall never be blockaded, nor shall any right of war be exercised nor any act of hostility be committed within it. The United States, however, shall be at liberty to maintain such military police along the canal as may be necessary to protect it against lawlessness and disorder.

3. Vessels of war of a belligerent shall not revictual nor take any stores in the canal except so far as may be strictly necessary; and the transit of such vessels through the canal shall be effected with the least possible delay in accordance with the regulations in force, and with only such intermission as may result from the necessities of the service.

Prizes shall be in all respects subject to the same rules as vessels of war of the belligerents.

4. No belligerent shall embark or disembark troops, munitions of war, or warlike materials in the canal, except in case of acci-

dental hindrance of the transit, and in such case the transit shall be resumed with all possible dispatch.

5. The provisions of this article shall apply to waters adjacent to the canal, within 3 marine miles of either end. Vessels of war of a belligerent shall not remain in such waters longer than 24 hours at any one time, except in case of distress, and in such case, shall depart as soon as possible; but a vessel of war of one belligerent shall not depart within 24 hours from the departure of a vessel of war of the other belligerent.

6. The plant, establishments, buildings, and all work necessary to the construction, maintenance, and operation of the canal shall be deemed to be part thereof, for the purposes of this treaty, and in time of war, as in time of peace, shall enjoy complete immunity from attack or injury by belligerents, and from acts calculated to impair their usefulness as part of the canal. (32 U. S. Stat., Pt. II, pp. 1903, 1904.)

Panama in the treaty of 1903 with the United States agreed in Article XVIII that—

The canal, when constructed, and the entrances thereto shall be neutral in perpetuity, and shall be opened upon the terms provided for by Section I of article 3 of, and in conformity with all the stipulations of, the treaty entered into by the Governments of the United States and Great Britain on November 18, 1901. (33 U. S. Stat., Pt. II, pp. 2234, 2239.)

*Neutrality proclamation, November 13, 1914.*—The rules in regard to neutrality of the Canal Zone define "vessel of war":

RULE 1. A vessel of war, for the purposes of these rules, is defined as follows: A public armed vessel, under the command of an officer duly commissioned by the government, whose name appears on the list of officers of the military fleet, and the crew of which are under regular naval discipline, which vessel is qualified by its armament and the character of its personnel to take offensive action against the public or private ships of the enemy. (38 U. S. Stat., p. 2039.)

It was provided in rule 2 that the same treatment should be given to a vessel "employed by a belligerent power as a transport or fleet auxiliary or in any other way for the direct purpose of prosecuting or aiding hostilities, whether by land or sea; but such treatment shall

not be given to a vessel fitted up and used exclusively as a hospital ship."

Rule 9 prescribed the same treatment for vessels of rule 1 and of rule 2, and rule 11 reads:

> When vessels of war or vessels falling under rule 2, belonging to or employed by opposing belligerents, are present simultaneously in the waters of the Canal Zone, a period of not less than 24 hours must elapse between the departure of the vessel belonging to or employed by one belligerent and the departure of the vessel belonging to or employed by his adversary.

*Gulf of Fonseca, 1917.*—The Bryan-Chamorro treaty of 1914, by which a right to establish a naval base in the territory of Nicaragua bordering on the Gulf of Fonseca was granted to the United States, came up for consideration before the Central American Court of Justice in 1917. The court, consisting of 5 jurors, considered 24 questions. Among these, several relate to the status of the Gulf of Fonseca.

> *Ninth question.*—Taking into consideration the geographic and historic conditions, as well as the situation, extent, and configuration of the Gulf of Fonseca, What is the international legal status of that gulf?
>
> The judges answered unanimously that it is an historic bay possessed of the characteristics of a closed sea.
>
> *Tenth question.*—As to which of those characteristics are the high parties litigant in accord?
>
> The judges answered unanimously that the parties are agreed that the gulf is a closed sea.
>
> *Eleventh question.*—What is the legal status of the Gulf of Fonseca in the light of the foregoing answer and the concurrence of the high parties litigant, as expressed in their arguments, with respect to ownership and the incidents derived therefrom?
>
> Judges Medal, Oreamuno, Castro, Ramírez, and Bocanegra answered that the legal status of the Gulf of Fonseca, according to the terms of the question, is that of property belonging to the three countries that surround it; and Judge Gutiérrez Navas answered that the ownership of the Gulf of Fonseca belongs, respectively, to the three riparian countries in proportion.
>
> *Twelfth question.*—Are the high parties litigant in accord as to the fact that the waters embraced in the inspection zones that pertain to each, respectively, are intermingled at the entrance of the Gulf of Fonseca?

The judges answered unanimously that the high parties are agreed that the waters which form the entrance to the gulf intermingle.

*Thirteenth question.*—What direction should the maritime inspection zone follow with respect to the coasts of the countries that surround the gulf?

Judges Medal, Oreamuno, Castro Ramírez, and Bocanegra answered that the zone should follow the contours of the respective coasts, as well within as outside the gulf; and Judge Gutiérrez Navas that, with respect to the Gulf of Fonseca, the radius of a marine league zone of territorial sea should be measured from a line drawn across the bay at the narrowest part of the entrance toward the high seas, and the zone of inspection extends 3 leagues more in the same direction.

*Fourteenth question.*—Does the right of coownership exist between the Republics of El Salvador and Nicaragua in the nonlittoral waters of the gulf, and in those waters also, that are intermingled because of the existence of the respective zones of inspection in which those Republics exercise police power and the rights of national security and defense?

Judges Medal, Oreamuno, Castro Ramírez, and Bocanegra answered that such right of coownership does exist, without prejudice, however, to the rights that belong to Honduras in those nonlittoral waters; Judge Gutiérrez Navas answered in the negative.

*Fifteenth question.*—Wherefore, as a consequence, and conformably with their internal laws and with international law, should there be excepted from the community of interest or coownership the league of maritime littoral that belongs to each of the States that surround the Gulf of Fonseca adjacent to the coasts of their mainlands and islands, respectively, and in which they have exercised, and may exercise, their exclusive sovereignty?

Answered in the affirmative by Judges Medal, Oreamuno, and Castro Ramírez; and in the negative by Judge Gutiérrez Navas, on the ground that in the interior of closed gulfs or bays there is no littoral zone; Judge Bocanegra answered in the affirmative on the ground that the high parties litigant, having accepted the Gulf of Fonseca as a closed bay, the existence of the marine league of exclusive ownership becomes necessary since the gulf belongs to three nations instead of one. (11 A. J. I. L., 1917, p. 693.)

*Aerial navigation convention, 1919.*—During the World War many questions had arisen in regard to the use of the air. In the convention for the regulation of aerial

navigation of 1919 certain general principles were set forth. In article 38 it was stated that the convention did not affect the freedom of action of the contracting states, either as belligerents or as neutrals. It is not to be assumed that belligerents would have greater freedom in time of war in neutral aerial space than in time of peace.

The following are some of the articles which seemed to be generally accepted:

ARTICLE 1

The high contracting parties recognize that every power has complete and exclusive sovereignty over the air space above its territory.

For the purpose of the present convention the territory of a state shall be understood as including the national territory, both that of the mother country and of the colonies, and the territorial waters adjacent thereto.

* * * * *

ARTICLE 3

Each contracting state is entitled, for military reasons or in the interest of public safety, to prohibit the aircraft of the other contracting states, under the penalties provided by its legislation and subject to no distinction being made in this respect between its private aircraft and those of the other contracting states, from flying over certain areas of its territory.

In that case the locality and the extent of the prohibited areas shall be published and notified beforehand to the other contracting states.

* * * * *

ARTICLE 32

No military aircraft of a contracting state shall fly over the territory of another contracting state nor land thereon without special authorization. In case of such authorization the military aircraft shall enjoy in principle, in the absence of special stipulation, the privileges which are customarily accorded to foreign ships of war.

A military aircraft which is forced to land or which is requested or summoned to land shall by reason thereof acquire

no right to the privileges referred to in the above paragraph. (Treaties, Conventions, International Acts, Protocols, and Agreements Between the United States and Other Powers, vol. III, pp. 3768, 3772.)

*Panama cities, 1914.*—In the proclamation of the United States relating to the neutrality of the Panama Canal Zone, November 13, 1914, it was provided, as to aircraft:

RULE 15. Aircraft of a belligerent power, public or private, are forbidden to descend or arise within the jurisdiction of the United States at the Canal Zone or to pass through the air spaces above the lands and waters within said jurisdiction.

RULE 16. For the purpose of these rules, the Canal Zone includes the cities of Panama and Colon and the harbors adjacent to the said cities. (38 U. S. Stat. p. 2039.)

The agreement of October 10, 1914, had provided:

That hospitality extended in the waters of the Republic of Panama to a belligerent vessel of war or a vessel belligerent or neutral, whether armed or not, which is employed by a belligerent power as a transport or fleet auxiliary or in any other way for the direct purpose of prosecuting or aiding hostilities, whether by land or sea, shall serve to deprive such vessel of like hospitality in the Panama Canal Zone for a period of three months, and vice versa. (Ibid. p. 2042.)

SOLUTION

(*c*) The vessels appearing at opposite ends of the Panama Canal have not the same privileges as in the Suez Canal, and should be allowed to pass through; but each should, after passing through, be detained till the other has passed through, in order that the departure of one may not be delayed by the passage of the other.

The Gulf of Fonseca is a territorial gulf, and therefore not open to the vessels of state X.

The aircraft from vessels of war of state X may not lawfully fly over Panama.

SITUATION II

## STATUS OF ISLANDS IN PACIFIC OCEAN

What changes in status of the islands of the Pacific Ocean have occurred since 1917?

### CONCLUSION

No exact interpretation of agreements relating to islands in the Pacific Ocean and entered into since 1917 has been made. The introduction of the system of mandates under article 22 of the Covenant of the League of Nations, 1919, the restrictions of fortifications by article 19 of the treaty limiting naval armament, 1922, and the other agreements, and the declaration of the Washington conference, 1922, as well as the "Kellogg-Briand pact" of 1928. have, however, greatly modified the status of the islands in the Pacific Ocean as areas of possible belligerent action.

### NOTES

*General.*—The status of islands in the Pacific Ocean in 1917 was dependent for the most part upon their relation to individual states. Some islands had been the subject of joint or collective action of states as in the case of the Samoan Islands. In the North Pacific Ocean, Germany, prior to the World War, had control of several groups of islands, and prior to 1922 other states exercised in other groups ordinary state authority. The results of the World War introduced certain new practices in the disposition of territory of the Pacific area. The system of administration by mandatories was substituted for direct acquisition. Later by agreement the exercise of

certain rights within the North Pacific area was renounced. Both the system of mandates and the treaties in regard to insular possessions or dominions in the Pacific have received much consideration, particularly the idea—mandates and control of backward areas.

*Early idea of mandates.*—The idea of mandate is not new in law. In Roman law a mandate might be the method by which the Emperor made known his will to a public functionary, but it was generally used to cover a quasi agency through the person to whom the mandate was given (Mandatarius). This person really acts in his own name rather than as an agent and the responsibilities are his. The Roman law limitation was to the effect that "He who discharges a mandate may not exceed its limitation." (Digest, XVII, 1, 3, 2.)

*Later ideas of mandates.*—In modern times one who accepted a mandate usually engaged to perform some service as regards the trust committed to him. It was customary to require an accounting for the service. In the mandate there was an implication of a performance of something more than simple custody, thus involving the performance of some obligation on the part of the mandatory power.

*Forms of control of dependent areas.*—The family of nations idea as variously understood at different periods, for example, 1648, 1776, 1856, 1899, seem to imply some collective obligation toward world welfare. The basis of membership in the family was recognition of international obligations and common principles.

The family of nations gradually assumed that it or its members might act as guardians, trustees, or assume the custody for peoples or areas outside of Europe, e. g., in Africa, Pacific islands, China, etc.

In the case of Johnson *v.* McIntosh, in the Supreme Court of the United States, 1823, Chief Justice Marshall said:

> On the discovery of this immense continent (America) the nations of Europe were eager to appropriate to themselves so

much of it as they could respectively acquire. Its vast extent offered an ample field to the ambition and enterprise of all; and the character and religion of its inhabitants afforded an apology for considering them as a people over whom the superior genius of Europe might claim an ascendency. The potentates of the Old World found no difficulty in convincing themselves that they made ample compensation to the inhabitants of the new, by bestowing on them civilization and Christianity in exchange for unlimited independence. (8 Wheat. 543.)

This control by European nations of areas outside of Europe received various names and was not uniform in degree or character, e. g., colonies, protectorates, suzerainties, spheres of influence, spheres of interest, etc. Often there was a desire to obtain a right without assuming the corresponding obligation. There are 50 or more examples of varied control since the early part of the nineteenth century, e. g., the Ionian Islands, South African Republic, Cuba, Philippines, etc.

The Institute of International Law in 1888 (Annuaire, vol. 10, pp. 173–201) took up consideration of this matter of dependent or less advanced peoples and proposed that when other states assumed sovereignty over such areas as were occupied by aboriginal or less advanced peoples the new authority should ameliorate the moral and material condition of these people, should provide for their education, guarantee liberty of conscience, both to natives and to aliens, freedom of worship, abolish slavery, provide for the "open door," prohibit the sale of intoxicating liquors, etc.

From the above it is evident that the idea of assumption of trusteeship over backward peoples has long been well established, and that the Covenant of the League of Nations in article 22 is merely a statement in concrete form of principles somewhat differently set forth in earlier documents.

During the latter part of the nineteenth century the states which regarded themselves as civilized often indicated their desire and intention to protect and to give to less advanced regions the benefits of their civilization.

This was particularly true in regard to Africa, and frequent conventions were entered into assuming responsibilities which were sometimes termed "tutorship," "guardianship," "wardship," etc. The general act of the Brussels conference in 1890 gives as its object "the firm intention of putting an end to the crimes and devastations engendered by the traffic in African slaves, of efficiently protecting the aboriginal population of Africa, and of securing for that vast continent the benefits of peace and civilization."

*Brussels act, 1890.*—The general act for the repression of African slave trade drawn up at Brussels in 1890, modifying the general act of Berlin of 1885, and usually referred to as the Brussels act of 1890, has regard to the protection of the aboriginal population of Africa. This act presumes the exercise of sovereignty or of the authority of a protectorate, and its articles cover many of the topics embodied in the terms of the class C mandates, such as the abolition of the slave trade, regulation of the traffic in arms and in intoxicating liquors, protection of missionaries, etc. A convention revising the general act and declaration of Brussels, July 2, 1890, was drawn up at Saint-Germain-en-Laye, September 10, 1919. This convention of 1919 renews many of the provisions of the earlier conventions with view to insuring "by arrangements suitable to modern requirements the application of the general principles of civilization established by the acts of Berlin and Brussels." These and other conventions show a recognition of collective responsibility for the well-being of less advanced peoples. In the setting up of control by protectorates, suzerainties, spheres of influence, spheres of interest, there has often been an attempt to secure for the dominant, state rights without the corresponding obligations.

*American attitude.*—The United States has from time to time assumed jurisdiction over tribes, sometimes speaking of them as "wards of the nation," or "pupils."

Liberia has been mentioned, and the United States has called itself "the next friend."

When by article 1 of the treaty of peace with the United States, 1898, Spain renounced all claim to sovereignty over and title to Cuba, question arose as to its status. A case before the Supreme Court in 1901 stated:

> While by the act of April 25, 1898, declaring war between this country and Spain, the President was directed and empowered to use our entire land and naval forces, as well as the militia of the several States to such extent as was necessary, to carry such act into effect, that authorization was not for the purpose of making Cuba an integral part of the United States but only for the purpose of compelling the relinquishment by Spain of its authority and government in that island and the withdrawal of its forces from Cuba and Cuban waters. The legislative and executive branches of the Government, by the joint resolution of April 20, 1898, expressly disclaimed any purpose to exercise sovereignty, jurisdiction, or control over Cuba "except for the pacification thereof," and asserted the determination of the United States, that object being accomplished, to leave the government and control of Cuba to its own people. All that has been done in relation to Cuba has had that end in view and, so far as the court is informed by the public history of the relations of this country with that island, nothing has been done inconsistent with the declared object of the war with Spain. * * *
>
> It is true that as between Spain and the United States—indeed, as between the United States and all foreign nations—Cuba, upon the cessation of hostilities with Spain and after the treaty of Paris, was to be treated as if it were conquered territory. But as between the United States and Cuba that island is territory held in trust for the inhabitants of Cuba, to whom it rightfully belongs, and to whose exclusive control it will be surrendered when a stable government shall have been established by their voluntary action. (Neely *v.* Henkel, 180 U. S. 109 (1901).)

In referring to President Roosevelt's proposition made in 1906 in regard to the adjustment of affairs in Morocco, through the Algeciras conference, Ambassador von Sternburg, of Germany, said:

> This would place the police forces entirely into their hands, and the police organization would be tantamount to a Franco-Spanish double mandate and mean a monopoly of these two countries, which would heavily curtail the political and economic positions

of the other nations. (Theodore Roosevelt and His Time, Bishop, Vol. I, p. 492.)

In the proposition made on behalf of the President annual reports by the Franco-Spanish authorities had been proposed and in the main the cost of administration was to be borne by the area, the "open door" and equal opportunity for trade was likewise to be maintained, and undue weight was not to be given to mere proximity of those to whom the "mandate" was intrusted.

*Negotiations on conquests, 1917.*—There had been plans for disposal of German dependencies. The British ambassador's memorandum at Tokyo, February 16, 1917, says:

> His Majesty's Government accedes with pleasure to the request of the Japanese Government for assurance that they will support Japan's claims in regard to the disposal of Germany's rights in Shantung and possessions in islands north of the Equator on the occasion of the peace conference, it being understood that the Japanese Government will, in the eventual peace settlement, treat in the same spirit Great Britain's claims to German islands south of the Equator. (Baker, Woodrow Wilson, and the World Settlement, vol. 1, p. 61.)

In contrast with the above, Lloyd George in the House of Commons on December 20, 1917, said:

> As to the German colonies, that is a matter that must be settled by the great international peace congress.

Other documents, earlier than this, show that the idea of "agent or mandatory" was not foreign to political adjustments. It was distinguished from condominium, which might establish a joint title, while in the mandate there might be joint administration through the responsibility of making a report.

*World War and German overseas possessions.*—The defeat of Germany in the World War left several million people who were formerly under German control outside of any established government, though under the military control of the allied powers. In Africa it was

estimated that there were 13,000,000, in Oceanica a few hundred thousand, and in Turkish areas there were several million.

*Article 22.*—The system of mandates is, in general, based upon article 22 of Part I of the Covenant of the League of Nations in the treaty of peace with Germany of June 28, 1918. This article is repeated in other treaties and is as follows:

ART. 22. To those colonies and territories which as a consequence of the late war have ceased to be under the sovereignty of the states which formerly governed them and which are inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world, there should be applied the principle that the well-being and development of such peoples form a sacred trust of civilization and that securities for the performance of this trust should be embodied in this covenant.

The best method of giving practical effect to this principle is that the tutelage of such peoples should be entrusted to advanced nations who by reason of their resources, their experience, or their geographical position can best undertake this responsibility and who are willing to accept it, and that this tutelage should be exercised by them as mandatories on behalf of the league.

The character of the mandate must differ according to the stage of the development of the people, the geographical situation of the territory, its economic conditions, and other similar circumstances.

Certain communities formerly belonging to the Turkish Empire have reached a stage of development where their existence as independent nations can be provisionally recognized subject to the rendering of administrative advice and assistance by a mandatory until such time as they are able to stand alone. The wishes of these communities must be a principal consideration in the selection of the mandatory.

Other peoples, especially those of central Africa, are at such a stage that the mandatory must be responsible for the administration of the territory under conditions which will guarantee freedom of conscience and religion, subject only to the maintenance of public order and morals, the prohibition of abuses such as the slave trade, the arms traffic, and the liquor traffic, and the prevention of the establishment of fortifications or military and naval bases and of military training of the natives for other than police purposes and the defense of territory, and will also secure equal

opportunities for the trade and commerce of other members of the league.

There are territories, such as southwest Africa and certain of the South Pacific islands, which, owing to the sparseness of their population, or their small size, or their remoteness from the centers of civilization, or their geographical contiguity to the territory of the mandatory, and other circumstances, can be best administered under the laws of the mandatory as integral portions of its territory, subject to the safeguards above mentioned in the interests of the indigenous population.

In every case of mandate the mandatory shall render to the council an annual report in reference to the territory committed to its charge.

The degree of authority, control, or administration to be exercised by the mandatory shall, if not previously agreed upon by the members of the league, be explicitly defined in each case by the council.

A permanent commission shall be constituted to receive and examine the annual reports of the mandatories and to advise the council on all matters relating to the observance of the mandates.

*Discussions in 1918.*—On January 7, 1918, Premier Lloyd George stated in an address to the trades-unions, as one of the bases for peace discussions, that—

Respecting the German colonies, they are held at the disposal of a conference whose decision must have primary regard to the wishes and interests of their native inhabitants. The governing consideration in all these cases must be that the inhabitants shall be placed under control of an administration acceptable to themselves, one of whose main purposes will be to prevent their exploitation for the benefit of European capitalists or governments.

On Thursday, January 24, 1918, the German chancellor, Count Von Hertling, commented upon the British and American propositions. In December, 1917, Russia had suggested the consideration of the terms of peace. Count Von Hertling said:

We at the time agreed to the proposal for inviting participators in the war to the negotiations, with the condition, however, that this invitation should be limited to a clearly defined period. On January 4, at 10 o'clock in the evening, this period expired. No answer had been received. The result is that we are bound no longer in any way so far as the entente is concerned; that we have a clear road in front of us for separate negotiations with

Russia, and also that, obviously, we are no longer bound in any way, as far as the entente is concerned, to the proposals for a general peace which have been submitted by the Russian delegation. Instead of the then anticipated reply which failed to come, two announcements have, as we all know, been made in the meantime by enemy statesmen—the speech by the English prime minister, Mr. Lloyd George, of January 7, and the message of President Wilson of the day after.

Speaking of President Wilson's fifth point in regard to the disposal of the German colonies, Count Von Hertling said:

> The practical carrying out of the principle laid down by Mr. Wilson will in this world of realities meet with some difficulties. In any case, I believe that for the time being it may be left to the greatest colonial empire—England—to determine as to how she will come to terms with her allies regarding this proposal. We shall have to talk about this point of the program at the time of reconstruction of the colonial possessions of the world, which has also been demanded unconditionally by us.

In President Wilson's reply of February 11, 1918, he stated four principles which he regarded as essential for peace:

> First, that each part of the final settlement must be based upon the essential justice of that particular case and upon such adjustments as are most likely to bring a peace that will be permanent;
>
> Second, that peoples and provinces are not to be bartered about from sovereignty to sovereignty as if they were mere chattels and pawns in a game, even the great game, now forever discredited, of the balance of power; but that—
>
> Third, every territorial settlement involved in this war must be made in the interest and for the benefit of the populations concerned and not as a part of any mere adjustment or compromise of claims amongst rival states; and
>
> Fourth, that all well-defined national aspirations shall be accorded the utmost satisfaction that can be accorded them without introducing new or perpetuating old elements of discord and antagonism that would be likely in time to break the peace of Europe and consequently of the world.

In his Mount Vernon address on July 14, 1918, President Wilson declared for—

The settlement of every question, whether of territory, of sovereignty, of economic arrangement, or of political relationship, upon the basis of the free acceptance of that settlement by the people immediately concerned and not upon the basis of the material interest or advantage of any other nation or people which may desire a different settlement for the sake of its own exterior influence or mastery.

*President Wilson's "Fourteen Points."*—Germany accepted the 14 points as set forth in President Wilson's address of January 8, 1918; and subsequent pronouncements in regard to the same as a basis for the restoration of peace, and on that ground agreed to an armistice November 11, 1918. The fifth of these points was as follows:

A free, open-minded, and absolutely impartial adjustment of all colonial claims, based upon a strict observance of the principle that in determining all such questions of sovereignty the interests of the populations concerned must have equal weight with the equitable claims of the government whose title is to be determined.

In drafting the terms of peace the disposition of the former dependencies of the German Empire was a matter of keen discussion. States that already had military possession of former German dependencies were inclined to regard these as just spoils of war. Claims to this effect were made particularly by representatives of the British Dominions and by France. Under President Wilson's arguments, however, the mandatory system was at length adopted.

*Mandatory system.*—The report presented to the peace conference February 14, 1919, by President Wilson, contained as article 19 the plan for the mandates. This article in a somewhat changed form became article 22 of the Covenant of the League of Nations. In presenting this article with the report upon the League of Nations constitution on February 14, 1919, President Wilson said of the idea of the mandatory system:

Then there is a feature about this covenant which, to my mind, is one of the greatest and most satisfactory advances that has been made. We are done with annexations of helpless people,

meant, in some instances by some powers, to be used merely for exploitation. We recognize in the most solemn manner that the helpless and undeveloped peoples of the world, being in that condition, put an obligation upon us to look after their interests primarily, before we use them for our interest, and that in all cases of this sort hereafter it shall be the duty of the league to see that the nations who are assigned as tutors and advisers and directors of these peoples shall look to their interests and their development before they look to the interests and desires of the mandatory nation itself.

There has been no greater advance than this, gentlemen. If you look back upon the history of the world, you will see how helpless peoples have so often been a prey to powers that had no conscience in the matter. It has been one of the many distressing revelations of recent years that the great power which has just been, happily, defeated, put intolerable burdens and injustices upon the helpless people in some of the colonies which it annexed to itself, that its interest was rather their extermination than their development; that the desire was to possess their land for European purposes, and not to enjoy their confidence in order that mankind might be lifted in these places to the next higher level.

Now, the world, expressing its conscience in law, says there is an end to that, that our consciences shall be settled to this thing. States will be picked out which have already shown that they can exercise a conscience in this matter and under their tutelage the helpless peoples of the world will come into a new light and into a new hope.

So I think I can say of this document that it is at one and the same time a practical document and a human document. There is a pulse of sympathy in it. There is a compulsion of conscience throughout it. It is practical, and yet it is intended to purify, to rectify, to elevate.

And I want to say that, so far as my observation instructs me, this is in one sense a belated document. I believe that the conscience of the world has long been prepared to express itself in some way. We are not just now discovering our sympathy for these people and our interest in them. We are simply expressing it, for it has long been felt and in the administration of affairs of more than one of the great states represented here—so far as I know, all the great states that are represented here—that humane impulse has already expressed itself in their dealings with their colonies, whose peoples were yet at a low stage of civilization.

We have had many instances of colonies lifted into the sphere of complete self-government. This is not the discovery of a principle. It is the universal application of a principle. It is the agreement of the great nations which have tried to live by these standards in their separate administrations, to unite in seeing that their common force and their common thought and intelligence are lent to this great and humane enterprise. I think it is an occasion, therefore, for the most profound satisfaction that this humane decision should be reached in a matter for which the world has long been waiting and until a very recent period thought that it was still too early to hope.

The delegates of the other great powers expressed their approbation of the interpretation which President Wilson had put upon the Covenant.

*Allocation of mandates.*—After the adoption of the Covenant of the League of Nations at the plenary session of the peace conference on April 28, 1919, an organization committee was authorized.

On May 7, 1919, the day on which the treaty of Versailles was handed to the German delegates, and directly thereafter, the supreme war council, on which the United States had a member, decided on the allocation of the mandates. This allocation was somewhat modified in the following August. The Germans had made certain counter propositions in regard to article 22 after the treaty was handed to them but no changes were made.

The treaty of peace was ratified January 10, 1920, and article 22 became operative.

*Title to German overseas possessions.*—Under article 119 of the treaty of Versailles—

Germany renounces in favor of the principal allied and associated powers all her rights and titles over her oversea possessions.

*Opinion of Mr. Balfour, 1920.*—Mr. Balfour, as Lord president of the council and as having participated in the organization of the League of Nations, explained the negotiations in regard to mandates in a speech June 17, 1920. He said:

My recollection of what occurred in Paris is this: Germany, by the terms of the peace, was required to give up all her colonies

conquered by the Allies and to hand them over, not to this or that country, and not to the League of Nations, but to the allied and associated powers. Having handed them over to the allied and associated powers those powers and the peace conference generally agreed that a system of mandates should be adopted, in the main, with the view of seeing that the populations of those countries should not be used merely as subjects, but that their true interests should be looked after, and that they should be treated, not as mere spoils and booty of war but as communities for which the civilized world had responsibilities. That great end, and I hope it will prove one of the greatest ends attained by the pact, was to be obtained by mandates, but, according to my recollection, while the terms of the mandates were to be determined by the peace conference, the superintendence of the use to which those mandates were put was left to the League of Nations. That is my view of what was intended at Paris, and I believe that view to be absolutely correct. In those circumstances I think it is much to be regretted that the mandates are not ready yet, but I do not see that that is a matter for which the League of Nations can be blamed. I do not think anybody can be blamed. Everybody knows the negotiations have taken much longer than it was hoped or anticipated they would take. The League of Nations will come in when the mandatory powers have accepted the responsibilities of carrying out the mandates and will be required to tell the whole civilized world annually how it is they are carrying out the great trust which has been conveyed to them. Then the League of Nations will come in, and I hope they will do their duty. That is the general view which I take of the situation, and I believe it to be exactly in accordance with the facts. (130 H. C. Deb. 5s., 1554.)

*Statement of British Prime Minister, 1920.*—Mr. Lloyd-George, June 22, 1920, in the House of Commons, spoke of the relation of the mandatory system:

Then I would like at once to challenge the claim made by my right honorable friend that the League of Nations has got to dispose of these mandates. I do not accept that. It is not the view that was taken by any of the signatories to the treaty of Versailles. It is not the view which was taken by President Wilson, who was the champion of the League, who had no interest—I do not, of course, mean personal interest—but who had no particular interest even as representative of the United States in the distribution of the German mandates. At Versailles we laid down the terms of the German treaty. We then met for the purpose of

distributing the mandates for the German territory with President Wilson there. Under the German treaty the German colonies are handed over, not to the League of Nations but to the allied and associated powers. By the very terms of the treaty it is for them to decide who are the mandatories After all, the expense of emancipating these colonies fell upon the Allies. We took exactly the same line with regard to the Turkish treaty. Article 94 says:

"The determination of the other frontiers of the said states and the selection of the mandatories will be made by the principal allied powers."

The principal allied powers met after that document had been prepared and decided what the mandates were. I repudiate entirely the suggestion that it is for the League of Nations to determine who shall be the mandatories of those countries.

Does my right honorable friend mean to say that the League of Nations could meet and hand over the mandate for countries that cost us hundreds of millions to emancipate, like Mesopotamia and Palestine, to Germany? It would be an intolerable position, and we certainly could not accept it. No one ever contemplated it. I never heard that contention put forward by anyone until I heard it in this House, to my amazement, the other night. President Wilson certainly never put it forward. He was present at the meeting where the allied and associate powers distributed the mandates under the German treaty. I take the same view about the Turkish mandates, that the allied and associated powers should determine who should be the mandatories. The terms of the mandate will be submitted to the League of Nations. That is another matter. The way in which the mandates are carried out will be discussed by the League of Nations. That is another matter. If there is any abuse of those terms, it will be for the League of Nations to consider it. If the natives are oppressed by a mandatory, if an unfair use is made of the powers of a particular mandatory, then the League of Nations may operate; but it is for the allied and associated powers, who have emancipated these territories, to determine who the mandatory should be, and that has been done. (130 H. C. Deb. 5s., 2256.)

In a memorandum of the secretary-general of the League of Nations presented to the council on July 30, 1920, it was stated:

6. (*a*) A legal title to the necessary rights of authority and administration must be conferred on the respective mandatory powers by the principal allied and associated powers, in whom the

title to these territories is at present vested. (Assembly Document 161, p. 10.)

On March 1, 1921, in reply to a letter of the Secretary of State of the United States of February 21, 1921, the League of Nations Council said:

The League of Nations Council would remind your excellency that the allocation of the mandated territories is a function of the supreme council and not of the council of the league.

*Mandated areas.*—Pacific islands under mandates are as follows:

| Islands | Mandatory |
|---|---|
| Samoa (German) | New Zealand. |
| Nauru | British Empire. |
| Other former German Pacific islands south of Equator | Australia. |
| Former German Pacific islands north of Equator | Japan. |

These mandates were confirmed December 17, 1920, and are usually called class C mandates and are in accordance with article 22, paragraph 6, of the Covenant of the League of Nations.

*German overseas territory under peace treaty.*—Article 118 of the treaty of Versailles, June 24, 1919, which came into effect January 10, 1920, provides:

In territory outside her European frontiers as fixed by the present treaty, Germany renounces all rights, titles, and privileges whatever in or over territory which belonged to her or to her allies, and all rights, titles, and privileges whatever their origin which she held as against the allied and associated powers.

Germany hereby undertakes to recognize and to conform to the measures which may be taken now or in the future by the principal allied and associated powers, in agreement where necessary with third powers, in order to carry the above stipulation into effect.

In particular, Germany declares her acceptance of the following articles relating to certain special subjects.

In article 119 it was said:

Germany renounces in favour of the principal allied and associated powers all her rights and titles over her oversea possessions.

Articles 120–127 enumerate special provisions, and article 120 refers to article 257, as follows:

All movable and immovable property in such territories belonging to the German Empire or to any German State shall pass to the Government exercising authority over such territories, on the terms laid down in article 257 of Part IX (financial clauses) of the present treaty. The decision of the local courts in any dispute as to the nature of such property shall be final.

In article 120 it is evident that as the treaty constituted a whole, Germany's right and title was intended to pass to the principal allied and associated powers with the purpose that some government should exercise authority over the territories under the terms of article 257, which provided that—

In the case of the former German territories, including colonies, protectorates, or dependencies, administered by a mandatory under article 22 of Part I (League of Nations) of the present treaty, neither the territory nor the mandatory power shall be charged with any portion of the debt of the German Empire or States.

All property and possessions belonging to the German Empire or to the German States situated in such territories shall be transferred with the territories to the mandatory power in its capacity as such, and no payment shall be made nor any credit given to those governments in consideration of this transfer.

For the purposes of this article the property and possessions of the German Empire and of the German States shall be deemed to include all the property of the Crown, the Empire, or the States, and the private property of the former German Emperor and other royal personages.

The mandatory power received, therefore, the German public property rights, though from an interpretation adopted by the mandates commission at its fourth session, Geneva, June 24–July 8, 1924, it was indicated that the mandatory authority was administrative.

The mandatory powers do not possess, in virtue of articles 120 and 257 (par. 2) of the treaty of Versailles, any right over any part of the territory under mandate other than that resulting from their having been intrusted with the administration of the territory. If any legislative enactment relating to land tenure

should lead to conclusions contrary to these principles, it would be desirable that the text should be modified in order not to allow of any doubt.

By article 127:

> The native inhabitants of the former German overseas possessions shall be entitled to the diplomatic protection of the governments exercising authority over those territories.

As allegiance is the natural corollary to the right of protection, both territory and native population come under the mandatory and under limitations of the terms of the mandate, the mandatory authority succeeds to that of Germany.

Thus, as a result of the World War and the negotiations following, it became evident that certain territories formerly belonging to or under the control of Germany, could no longer be retained; they could not be ceded to any of the victors in the war; there was no inclination to establish joint jurisdiction; the League of Nations was not organized to assume jurisdiction; the welfare of the former German possessions was of general interest; and the trust idea under a mandate seemed most acceptable.

The mandate system is now a fact. Into what it may merge is problematical.

The basis for a valid mandate would seem to rest on (1) power of the grantor, i. e., allied and associated powers; (2) allocation by these powers; (3) acceptance by the mandatory; and (4) approval by the League of Nations Council.

Apparently agreement between the council and mandatory may amend or modify the terms of the mandate.

Further, a mandate of class A may terminate by the recognition of the independence of the mandate, or by entrance of the mandate into the League of Nations as a member, or by agreement by the League of Nations Council and the mandatory.

As the agreement is a bilateral one, it is questionable whether it can be terminated by one of the parties without the consent of the other.

Apparently the United States would have no legal concern with mandates of class A, as the United States was not at war with Turkey. In some of the correspondence, however, the United States has assumed rights in regard to these mandates.

*Status of mandates.*—Sovereignty was not granted to the mandatory power. Sovereignty or any other fundamental state attribute is never transferred except by express stipulation. The exercise of sovereign rights may be permitted without the transfer of sovereignty.

Jurisdiction, as the right to exercise state authority, is frequently granted to a state within the territory of another state, even when sovereignty is not transferred. In some instances bare sovereignty only seems to be retained by the grantor, e. g., in some leased territory. The administration of an area may be as if by a sovereign power when sovereignty does not exist in the administrator.

In case of mandated areas the hope was to avoid the award of spoils of war in the ancient sense. If sovereignty was granted to the mandatory, there would have been no reason for a mandate, and if a state was sovereign, there could be no obligation to make annual reports in regard to the administration or to act in accord with the mandate. Sovereignty implies absence of accountability to an outside authority.

In case of mandated areas mandatories have only a qualified jurisdiction which they have agreed to exercise under certain restrictions. They have received a kind of administrative trust. Mandated areas may be the source of valuable or essential war supplies. The areas are identified with the mandatory administratively and to that extent are regarded as integral parts of the mandatory's territory and therefore, in absence of other agreement, they become liable to the same treatment as the territory of the mandate in the time of war.

The German right and title to the mandated areas was transferred to the principal allied and associated powers

by article 119 and apparently remains there till lawfully transferred elsewhere.

The United States, participating in the acts of the supreme war council, agreed in allocating the mandates of 1919, but did not ratify the treaty of Versailles in article 22 of which provision was made in regard to the administration of the mandates.

The right to exercise certain specified jurisdictional powers under specified conditions has been conferred upon the mandatories. This right does not give the powers entrusted with the mandates authority to transfer the mandates, as would be the case if sovereignty had been granted, even from one subdivision to another subdivision of a state having within its entity several political unities. This may be seen in the report of the sixth committee (mandates) to the assembly of the League of Nations, September 16, 1922, in which it was said:

> With regard to the Nauru mandate dealt with in Part II of the report of the permanent mandates commission, the sixth committee deems it advisable to prevent possible misinterpretation by taking note:
>
> First, that the British Empire (the unit responsible for the Nauru mandate) consists of Great Britain together with a number of territories all owing a common allegiance but distinct in their respective powers of government, and the mandatory authority of the British Empire can therefore only be exercised by some one or more of the several Governments of the territories composing the Empire. If, for the statement in the report that the British Empire "had transferred the responsibility for the administration of the Island of Nauru to Great Britain, Australia, and New Zealand," there were substituted a statement that "the British Empire had provided for the administration of the Island of Nauru by Great Britain, Australia, and New Zealand," the position would be defined with greater precision and exactitude.
>
> Secondly, that the statement in the report that the governments of Great Britain, Australia, and New Zealand had reserved to themselves the exclusive rights of the administration of the rich deposits of phosphates which constitute the wealth of the island is capable of misinterpretation without the explanation that the three governments acquired by direct purchase through voluntary sale on the part of the owners and not through the mandate ex-

clusive rights granted before the war by the German Government to a private company.

*Neutralization.*—Neutralization of mandated areas has been proposed and neutralization of the Pacific islands was at one time considered at the Conference on the Limitation of Armament, 1921–22. Neutralization would, if observed, restrict all powers alike from any war use of the mandated areas, giving them a quasi international status. This plan has not been approved. The Pacific islands have been placed under mandates, thus giving them a qualified national status as integral parts of the territory of mandatory.

While there has been discussion as to the neutralization of mandates, the terms of some of the mandates do not seem to indicate that neutralization or even neutrality when the mandatory might be at war was contemplated. The mandate respecting Syria and Lebanon, to which by special convention of 1924 France consented, provided in article 2 that—

> The mandatory may maintain its troops in the said territory for its defense. It shall further be empowered, until the entry into force of the organic law and the reestablishment of public security, to organize such local militia as may be necessary for the defense of the territory, and to employ this militia for defense and also for the maintenance of order. These local forces may only be recruited from the inhabitants of the said territory.
>
> The said militia shall thereafter be under the local authorities, subject to the authority and the control which the mandatory shall retain over these forces. It shall not be used for purposes other than those above specified save with the consent of the mandatory.
>
> Nothing shall preclude Syria and the Lebanon from contributing to the cost of the maintenance of the forces of the mandatory stationed in the territory.
>
> The mandatory shall at all times possess the right to make use of the ports, railways, and means of communication of Syria and the Lebanon for the passage of its troops and of all materials, supplies and fuel. (1924 N. W. C. Int. Law Documents, 62.)

The consent of the Council of the League of Nations and the assent of the United States is required for any modification of the terms of the mandate.

From the terms of this mandate respecting Syria and Lebanon it is clear that passage of troops and the use of the territory for military purposes is permitted, which would scarcely be consistent with a status of neutrality.

The mandates for islands in the Pacific provide that—

> The mandatory shall have full power of administration and legislation over the territory subject to the present mandate as an integral portion of his territory. (Art. 2, 1924, N. W. C. Int. Law Documents, p. 81.)

and that—

> The military training of the natives, otherwise than for purposes of international police and the local defense of the territory, shall be prohibited. Furthermore, no militia or naval bases shall be established or fortification erected in the territory. (Art. 4, ibid.)

Manifestly, this is not a neutralization agreement, nor does it establish neutrality of the mandated area if the mandatory is at war. As the mandatory may administer the mandate as an integral part of his territory, subject to the restrictions as to military training of the natives, etc., it would have the same status. Other areas in the Pacific Ocean are under restriction as to fortifications, etc., by Article XIX of the treaty limiting naval armament, but such articles are limited to their specific provisions and carry no further implications.

*Terms of mandates.*—The terms of the island mandates are in general similar to those shown by the mandates for islands south and north of the Equator.

[*Letter from the secretary-general to the members of the League concerning the terms of C mandates*]

[League of Nations Official Journal, January–February, 1921]

GENEVA, *January 15, 1921.*

SIR: I have the honour to inform you that the Council of the League of Nations, at its meeting at Geneva on December 17, under the presidency of His Excellency M. Hymans, settled the terms of the following mandates in conformity with article 22, paragraph 6, of the covenant:

The mandates in question are the British mandates in respect of the following territories:

(1) The mandate for German Southwest Africa, which is conferred upon His Britannic Majesty, to be exercised on his behalf by the Government of the Union of South Africa.[1]

(2) The mandate for German Samoa, which is conferred upon His Britannic Majesty, to be exercised on his behalf by the Government of the Dominion of New Zealand.[1]

(3) The mandate for the Island of Nauru, which is conferred upon His Britannic Majesty.[1]

(4) The mandate for the German possessions, other than German Samoa and Nauru, situated in the Pacific Ocean to the south of the Equator, which is conferred upon His Britannic Majesty, to be exercised on his behalf by the Government of the Commonwealth of Australia; and the Japanese mandate in respect of the German possessions to the north of the Equator, which is conferred upon His Majesty the Emperor of Japan.

I have the honor to transmit the attached text of these mandates, together with a declaration by the Japanese Government.

I am, sir, your most obedient servant,

ERIC DRUMMOND,
*Secretary-General.*

MANDATE FOR THE GERMAN POSSESSIONS IN THE PACIFIC OCEAN SITUATED SOUTH OF THE EQUATOR, OTHER THAN GERMAN SAMOA AND NAURU

*The Council of the League of Nations:*

Whereas by article 119 of the treaty of peace with Germany signed at Versailles on June 28, 1919, Germany renounced in favor of the principal allied and associated powers all her rights over her oversea possessions, including therein German New Guinea and the groups of islands in the Pacific Ocean lying south of the Equator other than German Samoa and Nauru; and

Whereas the principal allied and associated powers agreed that in accordance with article 22, Part I (Covenant of the League of Nations) of the said treaty, a mandate should be conferred upon His Britannic Majesty to be exercised on his behalf by the Government of the Commonwealth of Australia to administer New Guinea and the said islands, and have proposed that the mandate should be formulated in the following terms; and

Whereas His Britannic Majesty, for and on behalf of the Government of the Commonwealth of Australia, has agreed to accept the mandate in respect of the said territory and has under-

[1] Not printed.

taken to exercise it on behalf of the League of Nations in accordance with the following provisions; and

Whereas by the aforementioned article 22, paragraph 8, it is provided that the degree of authority, control, or administration to be exercised by the mandatory not having been previously agreed upon by the members of the League, shall be explicitly defined by the Council of the League of Nations;

Confirming the said mandate, defines its terms as follows:

ARTICLE 1

The territory over which a mandate is conferred upon His Britannic Majesty for and on behalf of the Government of the Commonwealth of Australia (hereinafter called the mandatory) comprises the former German colony of New Guinea and the former German islands of the Pacific Ocean and lying south of the Equator, other than the islands of the Samoan Group and the island of Nauru.

ARTICLE 2

The mandatory shall have full power of administration and legislation over the territory subject to the present mandate as an integral portion of the Commonwealth of Australia, and may apply the laws of the Commonwealth of Australia to the territory, subject to such local modifications as circumstances may require.

The mandatory shall promote to the utmost the material and moral well-being and the social progress of the inhabitants of the territory subject to the present mandate.

ARTICLE 3

The mandatory shall see that the slave trade is prohibited and that no forced labor is permitted, except for essential public works and services, and then only for adequate remuneration.

The mandatory shall also see that the traffic in arms and ammunition is controlled in accordance with principles analogous to those laid down in the convention relating to the control of the arms traffic signed on September 10, 1919, or in any convention amending the same.

The supply of intoxicating spirits and beverages to the natives shall be prohibited.

ARTICLE 4

The military training of the natives, otherwise than for purposes of internal police and the local defense of the territory,

shall be prohibited. Furthermore, no military or naval bases shall be established or fortifications erected in the territory.

ARTICLE 5

Subject to the provisions of any local law for the maintenance of public order and public morals, the mandatory shall insure in the territory freedom of conscience and the free exercise of all forms of worship, and shall allow all missionaries, nationals of any state member of the League of Nations, to enter into, travel, and reside in the territory for the purpose of prosecuting their calling.

ARTICLE 6

The mandatory shall make to the Council of the League of Nations an annual report to the satisfaction of the council containing full information with regard to the territory and indicating the measures taken to carry out the obligations assumed under articles 2, 3, 4, and 5.

ARTICLE 7

The consent of the Council of the League of Nations is required for any modification of the terms of the present mandate.

The mandatory agrees that if any dispute whatever should arise between the mandatory and another member of the League of Nations relating to the interpretation or the application of the provisions of the mandate such dispute, if it can not be settled by negotiations, shall be submitted to the Permanent Court of International Justice provided for by article 14 of the Covenant of the League of Nations.

The present declarations shall be deposited in the archives of the League of Nations. Certified copies shall be forwarded by the secretary-general of the League of Nations to all powers signatories of the treaty of peace with Germany.

Certified true copy.

SECRETARY-GENERAL.

Made at Geneva the 17th day of December, 1920.

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MANDATE FOR THE FORMER GERMAN POSSESSIONS IN THE PACIFIC OCEAN LYING NORTH OF THE EQUATOR

*The Council of the League of Nations:*

Whereas by article 119 of the treaty of peace with Germany signed at Versailles on June 28, 1919, Germany renounced in

favor of the principal allied and associated powers all her rights over her oversea possessions, including therein the groups of islands in the Pacific Ocean lying north of the Equator; and

Whereas the principal allied and associated powers agreed that in accordance with article 22, Part I (Covenant of the League of Nations) of the said treaty a mandate should be conferred upon His Majesty the Emperor of Japan to administer the said islands, and have proposed that the mandate should be formulated in the following terms; and

Whereas His Majesty the Emperor of Japan has agreed to accept the mandate in respect of the said islands and has undertaken to exercise it on behalf of the League of Nations in accordance with the following provisions; and

Whereas by the aforementioned article 22, paragraph 8, it is provided that the degree of authority, control, or administration to be exercised by the mandatory, not having been previously agreed upon by the members of the League, shall be explicitly defined by the Council of the League of Nations.

Confirming the said mandate, defines its terms as follows:

ARTICLE 1

The islands over which a mandate is conferred upon His Majesty the Emperor of Japan (hereinafter called the mandatory) comprise all the former German islands situated in the Pacific Ocean and lying north of the Equator.

ARTICLE 2

The mandatory shall have full power of administration and legislation over the territory subject to the present mandate as an integral portion of the Empire of Japan, and may apply the laws of the Empire of Japan to the territory, subject to such local modifications as circumstances may require.

The mandatory shall promote to the utmost the material and moral well-being and the social progress of the inhabitants of the territory subject to the present mandate.

ARTICLE 3

The mandatory shall see that the slave trade is prohibited and that no forced labor is permitted, except for essential public works and services, and then only for adequate remuneration.

The mandatory shall also see that the traffic in arms and ammunition is controlled in accordance with principles analogous to those laid down in the convention relating to the control of

the arms traffic, signed on September 10, 1919, or in any convention amending same.

The supply of intoxicating spirits and beverages to the natives shall be prohibited.

ARTICLE 4

The military training of the natives, otherwise than for purposes of internal police and the local defense of the territory, shall be prohibited. Furthermore, no military or naval bases shall be established or fortifications erected in the territory.

ARTICLE 5

Subject to the provisions of any local law for the maintenance of public order and public morals, the mandatory shall insure in the territory freedom of conscience and the free exercise of all forms of worship, and shall allow all missionaries, nationals of any state member of the League of Nations, to enter into, travel, and reside in the territory for the purpose of prosecuting their calling.

ARTICLE 6

The mandatory shall make to the Council of the League of Nations an annual report to the satisfaction of the council, containing full information with regard to the territory, and indicating measures taken to carry out the obligations assumed under articles 2, 3, 4, and 5.

ARTICLE 7

The consent of the Council of the League of Nations is required for any modification of the terms of the present mandate.

The mandatory agrees that if any dispute whatever should arise between the mandatory and another member of the League of Nations relating to the interpretation or the application of the provisions of the mandate, such dispute, if it can not be settled by negotiation, shall be submitted to the Permanent Court of International Justice provided for by article 14 of the covenant of the League of Nations.

The present declaration shall be deposited in the archives of the League of Nations. Certified copies shall be forwarded by the secretary-general of the League of Nations to all powers signatories of the treaty of peace with Germany.

Made at Geneva the 17th of December, 1920.

Exactly what control the League of Nations may have in every instance is left somewhat in doubt through the

difficulty of interpreting the clause of article 22, which provides:

> The degree of authority, control, or administration to be exercised by the mandatory shall, if not previously agreed upon by the members of the League, be explicitly defined in each case by the council.

In any case, however, the council is to be advised "on all matters relating to observance of the mandate," and is to receive an annual report in reference to the territory committed to the mandatory.

*Period of mandate.*—On concluding a chapter on League of Nations mandates, M. F. Lindley says:

> We have seen that there appears to exist no power to revoke a mandate against the will of the mandatory. Nor, it would seem, can a mandatory relinquish its mandate without the consent of the Council of the League. A mandatory which, without such consent, laid down its task, or which failed to carry out its mandate according to the terms thereof, would thereby commit a breach of the undertaking it has given to the other members of the League, and would be in the position of a treaty-breaking or law-breaking state. * * *
>
> But while the consensus of the council and the mandatory would appear to be sufficient to terminate a particular mandate, it does not necessarily follow that such a consensus would be sufficient to release a country under mandate from the mandatory system altogether. * * *
>
> In the case of A mandate countries, "Their existence as independent nations" is "provisionally recognized" in Article 22 of the covenant, "subject to the rendering of administrative advice and assistance by a mandatory until such time as they are able to stand alone"; and it may be that, in those cases, not only a particular mandate, but the application of the mandatory system altogether, could be terminated by agreement between the council and the mandatory; or by the admission of the mandated country to the League, with the assent of the mandatory, as is contemplated in the case of Iraq. And even without the assent of the mandatory, a two-thirds vote of the assembly admitting an A mandate country to membership of the league under Section I of the covenant would appear to amount to a declaration that, in the opinion of the majority of the assembly, the mandated country had reached a condition in which it was "able to stand alone," and therefore might claim to dispense with the administrative advice and assistance of the mandatory.

In the case of B mandate and C mandate territory, however, article 22 does not appear to contemplate the termination of the status of "territory under mandate." Any change in that status would thus probably require to be made in the manner laid down in article 26 for making amendments to the covenant, and perhaps also with the consent of the United States. (The Acquisition and Government of Backward Territory in International Law, M. F. Lindley, 268.)

*Source of authority.*—Some have maintained that article 119 of the treaty of Versailles by which "Germany renounces in favor of the principal allied and associated powers all her rights and titles over her overseas possessions," did not relinquish sovereignty over these possessions. This would seem not to need much discussion as regards mandated areas because these are according to article 22 of the treaty "those colonies and territories which as a consequence of the late war have ceased to be under the sovereignty of the states which formerly governed them," and of their inhabitants this article provides "that the well-being and development of such peoples form a sacred trust of civilization." The best method of giving practical effect to this principle is that tutelage of such peoples should be intrusted to advanced nations. This allocation of the trust could be made only by the principal allied and associated powers, and article 22 further provides that for the states willing to accept it, "this tutelage should be exercised by them as mandatories on behalf of the League."

The introduction of the principle of mandates as is evident from the discussions in drawing up article 22 was to do away as regards these areas with the earlier practice of annexations by victors of territories of their enemies. It was considered, nevertheless, that some of these could "be best administered under the laws of the mandatory as integral portions of its territory," and annual reports of the administration were to be made as might be required in other trusts.

In subsequent interpretations it was shown that the natives of mandated territories did not acquire the na-

tionality of the mandatory but might by individual act acquire such nationality in accord with the law of the mandatory. Frontiers and boundaries were fixed and terms of administrative control were determined.

From article 22 it is clear that the territories allocated to the mandatories "have ceased to be under the sovereignty of the states which formerly governed them." It is equally clear that the mandatories are exercising only a tutelage on behalf of the League. The allocation was made by the powers to which the territories had passed by articles 118 and 119. The C mandates do not become a part of but may be administered as "integral portions of" the territory of a mandatory.

*General observations.*—While mandates of class A and class B might be considered important, those of class C have particularly given rise to many questions as to status. The class C mandates are those portions of the former German possessions which in Southwest Africa and in the Pacific area passed to the principal allied and associated powers by article 119 of the treaty of Versailles of June 28, 1919. The institution of the mandates system was an attempt to put an end to the distribution of territory among the victors as spoils of war. The peoples of the mandated regions were regarded as "not yet able to stand by themselves under the strenuous conditions of the modern world." It was hoped that through a period of tutelage these peoples would develop capacity for government. In order that there might be assured to these peoples approved care, annual reports were to be made to the Council of the League of Nations.

Claims have been made for several persons as originators of the mandate system. The idea antedates 1919 and the proposition that there should be collective responsibility for the care of the backward races was not new. The establishment of the permanent mandates commission brought about a degree of centralized supervision over the mandates and more important than the

supervision, a source from which information as to the administration of backward areas might be gained. The mandates commission early realized that the tendering of advice rather than criticism would be sound policy in promoting the well being of the mandates.

As the years have passed, it has become more and more evident that the grant of a mandate is not a veiled annexation as was anticipated by some. It must be admitted, however, that the exact legal status of a mandated territory is not easily placed under preexisting categories and that there are wide differences of opinion as to the category under which the exercise of authority by the mandatory should be considered. Some even maintain that the mandatory relationship is a new international category.

One of the striking features of the mandatory systems is the fact that mandated areas were granted to political entities previously having no colonial dependencies in the technical sense as in the case of the grant of southwest Africa to the Union of South Africa.

The terms of the class C mandates are fairly uniform usually prescribing more care for the natives of the mandatory area than seems to have been anticipated in the Covenant of the League of Nations.

*General mandate plan.*—Article 22 recognizes in class A certain "communities" in Turkey, in class B "peoples" in central Africa, in class C "territories" in southwest Africa and in the Pacific islands.

In this article 22 there is no stated intention to revoke or terminate a mandate.

There have been various queries as to whether permanent retention would be implied even at a cost to the power intrusted with the mandate. The mandates commission has promised that the mandates may be made to bear the cost of their administration only. In case there is a surplus income from the mandate, this surplus is supposed to be used for the benefit of the mandate.

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The principle of the open door has been generally asserted for all mandates, and consequently the special advantages for holding mandates are correspondingly fewer.

International control in some form was necessary in order to meet the expectations that had been aroused by the statement of high ideals and unselfish motives made by leaders during the war.

The plan for some form of trusteeship for dependent peoples had been discussed, and met with favor from many quarters. General Smuts had elaborated plans along this line. The establishment of such trusteeship would make unnecessary the usual contentions for colonies in after-war settlement.

*Japanese attitude.*—Declaration by the Japanese Government relating to C mandates.

[Read by Viscount Ishii at the meeting of the council, December 17, 1920]

From the fundamental spirit of the League of Nations and as the question of interpretation of the covenant, His Imperial Japanese Majesty's Government have a firm conviction of the justice of the claim they have hitherto made for the inclusion of a clause concerning the assurance of equal opportunities for trade and commerce in C mandates. But from the spirit of conciliation and cooperation and their reluctance to see the question unsettled any longer, they have decided to agree to the issue of the mandate in its present form. That decision, however, should not be considered as an acquiescence on the part of His Imperial Majesty's Japanese Government in the submission of Japanese subjects to a discriminatory and disadvantageous treatment in the mandated territories; nor have they thereby discarded their claim that the rights and interests enjoyed by Japanese subjects in these territories in the past should be fully respected.

*Opinion of Keith.*—Keith (War Government of the British Dominions, 1921), referring to the islands in the Southern Pacific under British mandate, said of New Guinea:

The chief point on which a commission of three, including the Lieutenant Governor of Papua, set up to advise as to the forms of administration, differed was whether the territory should be

administered as a part of or in subordination to Papua, as recommended by the lieutenant governor, or as an independent unit, on the same basis as Papua.

The final form of the legislation determined upon by the Government and presented to Parliament in August, 1920, adopts the plan of treating the German territories surrendered by the treaty of peace as a single unit, to be known as the territory of New Guinea, and the act gives power to the Governor General to accept the mandate for these territories when issued under the Covenant of the League of Nations (pp. 182–183).

## And Keith further said:

The provisions thus enacted represent precisely the existing state of the law respecting Papua, save in so far as the necessity of a report to the league is concerned, and demonstrate how little difficulty there was in applying the system of the covenant to the new territory.

For New Zealand the Samoan mandate involved much more serious difficulties. The power of the Dominion to legislate for Samoa without imperial authority was held to be doubtful, and in accordance with this view the issue of an imperial order in council was procured on March 11, 1920, authorizing the Dominion Parliament to legislate for Samoa, and pending such legislation, conferring authority on the Dominion Government to legislate, subject to the terms of the treaty of peace. In the meantime the New Zealand Parliament had passed an act in 1919 to provide for the acceptance of the mandate for Samoa and the approval of the issue of orders in council by the Government respecting the administration of the islands. It was then explained in the House of Representatives on October 17, 1919, that it had been desired to lay before the legislature a bill defining precisely the government of the islands, but this was rendered impossible by the delay in the issue of the mandate, whose terms could not definitely be defined before the ratification of the peace with Germany, and the constitution would, therefore, be determined later by order in council. There was a marked divergence between the act of 1919 and the imperial order in council regarding the source whence the mandate would be derived; the former measure treated the mandate as conferred on the King in right of his Dominion of New Zealand by the League of Nations; the latter, conforming precisely to the terms of the treaty of peace, recognized that while the mandate was granted according to the covenant of the League of Nations, it was accorded by the principal allied and associated powers, to which, and not to the league, the German territories were surrendered by the peace treaty. (Art. 119.)

The actual constitution for the islands of western Samoa is laid down in the Samoa constitution order, 1920, which is based on the authority given by the Dominion act of 1919 and the imperial order in council of 1920. By it the government of Samoa is vested in the King, as if the territory were part of his dominions, and is to be carried on, subject to the control of the Minister of External Affairs of New Zealand, by an administrator. (pp. 184–185.)

* * * * *

Mention was made by Sir Francis Bell in the Legislative Council of the fact that the terms of the proposed mandate contained an arrangement for the incorporation of the islands in New Zealand if at any time the natives showed a desire to be annexed to the Dominion and the allied and associated powers considered this desire to be deliberate and well founded. No such clause, however, appears in the mandate as approved by the council of the league on December 17, 1920 (p. 187).

In the case of the Nauru Island mandate, question has been raised both within Great Britain and outside as to the maintenance of the open door since the exploitation of the phosphate of the island by the United Kingdom and the Pacific commonwealths. The agreement on this matter was confirmed by Parliament July 29, 1920, "subject to article 22 of the covenant of the League of Nations."

*Central Africa.*—The mandates for central Africa declared that—

The mandatory shall have full powers of administration and legislation in the area subject to the mandate. This area shall be administered in accordance with the laws of the mandatory as an integral part of his territory and subject to the above provisions.

The mandatory shall, therefore, be at liberty to apply his laws to the territory subject to the mandate, with such modifications as may be required by local conditions, and to constitute the territory into a customs, fiscal, or administrative union or federation with the adjacent territories under his sovereignty or control, provided always that the measures adopted to that end do not infringe the provisions of this mandate. (Art. 9.)

Article 3 of the French mandates provided:

The mandatory shall not establish in the territory any military or naval bases, nor erect any fortifications, nor organize any

native military force except for local police purposes and for the defense of the territory.

It is understood, however, that the troops thus raised may in the event of general war be utilized to repel an attack or for the defense of the territory outside that subject to the mandate.

Article 4 of the Belgian mandate provided:

The mandatory shall not establish any military or naval bases, nor erect any fortifications, nor organize any native military force in the territory except for local police purposes and for the defense of the territory.

Article 3 of the British mandate provided:

The mandatory shall not establish in the territory any military or naval bases, nor erect any fortifications, nor organize any native military force except for local police purposes and for the defense of the territory.

*Status of mandates.*—At the first meeting of the permanent mandates commission, October, 1921, the director of the mandates section, Mr. Rappard, made a statement as to the territories handed over to the victorious allied and associated powers:

The mandatory system formed a kind of compromise between the proposition advanced by the advocates of annexation, and the proposition put forward by those who wished to intrust the colonial territories to an international administration.

From these facts certain general principles might already be deduced.

The mandatory powers had assumed a responsibility similar to that of a guardian with respect to his ward. The interests of the natives were therefore of primary importance, and the rights of all the members of the league must always be respected. It was in order to complete the League of Nations by a work of pacification that these colonies were intrusted to certain powers, subject to their securing equal opportunities for the trade and commerce of all the members of the league, and subject, also, to their being responsible to the league. Great moderation was exercised in this respect; the mandatory powers were only obliged to submit to the council a single annual report on their administration.

M. Rappard then proceeded to analyze article 22, and noted that the fourth paragraph dealt with former

Turkish territories, the fifth with the former German territories in central Africa, and the sixth with southwest Africa and certain Pacific islands.

The treatment to be applied to the populations of these territories varied according to the degree of their civilization. The Arab populations had been considered to have reached a sufficiently high degree of civilization to be recognized as independent nations, provided that their administration was guided by a mandatory until they were able to govern themselves. The populations of Central Africa were placed under a system of guardianship which was intended to protect them from well-known abuses; in territories of this class all the members of the League of Nations enjoyed the same economic rights. In this matter alone did they differ from the territories under class C, which were administered as an integral part of the territory of the mandatory power.

What then had been done since the covenant had entered into force? A question of principle had been settled regarding the competence of the supreme council and of the council of the league, respectively. The former German possessions had not been handed over—in virtue of the treaties—to the League of Nations, but to the principal allied and associated powers. As to the former Turkish possessions, the treaty of Sèvres, which had not yet been ratified, laid down that these should be ceded to the principal allied powers. It was the supreme council, therefore, which had disposed of these territories and which had divided them between the so-called mandatory powers. This took place at Versailles and at San Remo. The British Empire, which had received 9 mandates out of 14, was intrusted with part of Togoland and the Cameroons, with the greater part of East Africa and the island of Nauru in the Pacific, the administration of which it shared with Australia and New Zealand. To the British Empire were also allotted Mesopotamia and Palestine. The Southwest African was intrusted to South Africa. As regards the Pacific, Australia received New Guinea, New Zealand received Samoa, and the islands north of the Equator, including the island of Yap, were allotted to Japan. France was intrusted with Syria and the greater part of the Cameroons and Togoland; Belgium received a part of German East Africa bordering on the Belgian Congo. (Minutes, Permanent Mandates Commission. p. 4, C. 416. M., 296. 1921., VI.)

Mr. Rappard also said:

Mandates implied relations between a mandatory and the authority which conferred the mandate. The powers exercised their

mandates on behalf of the League of Nations, and the only official link between the mandatories and the league, in whose name they exercised their powers, was the mandatory's annual report. Now, the covenant laid down that it was the permanent mandates commission which should examine this report. Therefore, if there were no permanent commission, it might be said that the the mandates would exist only on paper and this would, in a measure, justify the opinion of the skeptics who saw in the mandates nothing but a veiled annexation. (Ibid., p. 6.)

*Discussion in mandates commission.*—In 1922 the chairman and representatives of the permanent mandates commission as a subcommittee made a tour of investigation as to the nationality of inhabitants of B and C mandates.

The British Government said:

As regards B mandates it is submitted that—

(*a*) The mandate does not in itself affect the nationality of the inhabitants of the territory mandated.

(*b*) The special conditions relating to administration as an integral part of the mandatory's territory, where they occur, should not affect the nationality of European inhabitants of the mandated territory.

(*c*) The nationality of the native inhabitants also of such territory remains unaffected by the special conditions referred to above. In this connection it may be pointed out that under article 127 of the treaty of Versailles, such natives are entitled to diplomatic protection by the mandatory power and that under the foreign office consular instructions, natives of territories under British mandates are already being treated as British-protected persons. The treatment of these natives as British-protected persons does not, of course, confer upon them British nationality. (3 League of Nations Official Journal, June, 1922, 595.)

Mr. Rappard, director of the mandates section, League of Nations Secretariat, on November 26, 1921, said, in discussing Belgian B mandates:

Were the mandatory states really sovereign with regard to the mandated territory? He thought they must reply in the negative. Germany, the State which possessed sovereign rights over the territory in question before and during the war, had ceded those rights; under the terms of the treaty she had left the fate of her colonies to be decided by the five principal allied powers and the League of Nations. The mandatory powers only derived their rights from these five great powers. Perhaps they might reply

that in these circumstances they were sovereign. But, interesting as the question might be from a legal point of view, it appeared to him yet more interesting from a political point of view. They must, he suggested, discuss a system which would fully satisfy all the interests concerned. It would then be the task of the jurists to give it a name and to set up a legal framework.

What were these interests?

First, there were the interests of the mandatory powers. It was quite natural that they should be inclined to give these interests precedence over the others. He would be the last to dispute it, or to venture on a discussion of Belgian interests with the representatives of Belgium. Might he, however, take the liberty of asking them, with all respect, if they considered that it was really in the interests of Belgium to confer her nationality on the peoples of the mandated territories? In any case it could not be, so far as military matters were concerned.

For even if, as seemed doubtful, the mandatory state was sovereign; even if it was master of its new nationals, it could not employ them for its army. In fact, the covenant laid down that these populations could only be armed for local defense. Again, in the economic sphere the covenant restricted proprietary rights over mandated territories.

There was one other point which he ventured to suggest to their Belgian friends: Would there not be serious political disadvantages for Belgium in administering the peoples of her mandated territory as if they were her own subjects? The inhabitants of this territory had an indisputable right to the protection of the League of Nations and might have recourse to it. Supposing that Belgium's other colonial subjects demanded the same right, how could they refuse it to them? They would claim, with apparent logic, that it was impossible to submit the subjects of one and the same country to different régimes.

*The interests of the inhabitants.*—It seemed to him beyond dispute that it was to the advantage of the inhabitants that they should be in close touch with the League of Nations; that is to say, that they should benefit by the protection which the League of Nations gave them under the terms of the covenant. Anything that tended to assimilate the inhabitants of the mandated territories to the inhabitants of ordinary colonies tended at the same time to limit the benefit that these inhabitants might derive from the special position of the League of Nations.

Lastly, there were the interests of the League of Nations. He thought there was no doubt that if they gave the inhabitants of mandated territories the nationality of the mandatory states, those who had always maintained that mandates were only a

disguised form of annexation would be confirmed in their opinion by such a decision; the persons who were neither enemies nor friends of the League of Nations would find it difficult to believe in the reality of mandates. He ventured to submit this point for the consideration of the Belgian Government. (3 League of Nations Journal, June, 1922, 603.)

The permanent mandates commission of the League of Nations considered for two years the status of inhabitants of B and C mandates. After its report was submitted to a drafting committee the council of the league adopted April 23, 1923, the following resolution, Japan abstaining:

The Council of the League of Nations,

Having considered the report of the permanent mandates commission on the national status of the inhabitants of territories under B and C mandates,

In accordance with the principles laid down in article 22 of the covenant:

Resolves as follows:

(1) The status of the native inhabitants of a mandated territory is distinct from that of the nationals of the mandatory power and can not be identified therewith by any process having general application.

(2) The native inhabitants of a mandated territory are not vested with the nationality of the mandatory power by reason of the protection extended to them.

(3) It is not inconsistent with (1) and (2) above that individual inhabitants of the mandated territory should voluntarily obtain naturalization from the mandatory power in accordance with arrangements which it is open to such powers to make, with this object, under its own law.

(4) It is desirable that native inhabitants who receive the protection of the mandatory power should in each case be designated by some form of descriptive title which will specify their status under the mandate. (4 League of Nations Official Journal, June, 1923, 604.)

*The case of Jacobus Christian* v. *Rex.*—In 1923 in the Supreme Court of South Africa the question was raised as to whether an inhabitant of Southwest Africa, a mandate under the Union of South Africa, was guilty of high treason against King George V on account of hostilities against the mandatory. In this case it was held that an

attack made upon the Government of the Union of South Africa, the "majestas operating internally," with hostile intent by an inhabitant of the mandatory would "be sufficient to found a charge of high treason." The court also gives an interpretation of the provisions of the treaty of Versailles:

> The legal position of Southwest Africa and its government under the treaty of Versailles must now be briefly examined. By article 119 Germany renounced in favor of the principal allied and associated powers—that is, in favor of the United States, the British Empire, France, Italy, and Japan—all rights and titles over her overseas possessions. The expression "renounce in favor of" is sometimes used in the treaty as equivalent to "cede to." By articles 83 and 87, for instance, Germany renounced in favor of Czechoslovakia and of Poland, respectively, all right and title over territory within certain boundaries separately specified. That was, in effect, a cession in each case of the territory indicated; it ceased to form portion of Germany, and it became portion of the new state. Not so with the overseas possessions, or, at any rate, with such of them as fell within the operation of article 22. They were not by article 119 ceded to all or any of the principal powers any more than the city of Danzig was ceded to them under article 100. The animus essential to a legal cession was not present on either side. For the signatories must have intended that such possessions should be dealt with as provided by Part I of the treaty; they were placed at the disposal of the principal powers merely that the latter might take all necessary steps for their administration on a mandatory basis. * * *
>
> The position in which the principal powers, the league, and the mandatory stand to one another is most vaguely stated. The main features are these: There was no cession of the German possessions to the principal powers; there was merely a renunciation in their favor in order that such possessions might be dealt with in accordance with the terms of the covenant. And the principal powers became bound as signatories to the treaty to do everything necessary on their part to give effect to the arrangement. This they did by selecting a mandatory as contemplated by article 118, and thereby conferring a mandate upon him. The matter then passed under the cognizance of the league, and it became the duty of the council to settle the terms of the mandate in conformity with the provisions of the covenant. The mandate having been accepted, the mandatory became obliged to report annually to the council. No limit was placed on the duration of

the mandate and no sanction was provided for a breach of its terms. It was probably considered that the force of public opinion, and in case of dispute the authority of the Court of International Justice would insure the due observance of the mandate. It is not necessary to inquire whether the mandate once given could be canceled either by the council, which did not appoint the mandatory, or by the principal powers, which having made the appointment passed the matter on to the council. (Juta, the South African Law Reports, 1924, Appellate Division, p. 101.)

*Attitude of mandates commission.*—In referring to class B mandates, the Cameroons and Togoland, which for administrative and fiscal purposes had been incorporated with Nigeria and the Gold Coast, the mandates commission said in 1924:

> The administrative union between these two mandated territories and the neighboring colonies of the mandatory power leads the commission to make a further observation.
>
> Under the terms of the mandates the mandatory power has the right to administer the countries concerned "as integral portions of its territory." This does not mean that the countries concerned have become integral portions of the neighboring colonies, as the wording of certain passages in the reports on Togoland and the Cameroons would appear to suggest.
>
> While the commission desires to bring this matter to the notice of the council, it does not exaggerate its importance. As, however, the passages referred to might lead to annexationist aims being attributed quite erroneously to the mandatory powers, it appears to the commission that their own interest, no less than that of the League of Nations, requires that in future any formula should be avoided which might give rise to doubts on the subject in the minds of ill-informed or ill-intentioned readers. (Minutes, Permanent Mandates Commission. p. 190. C. 617, M. 216, 1924, VI.)

*United States and mandates.*—In 1920 the United States and Great Britain had correspondence in regard to mandates particularly in the Near East. In this correspondence the United States welcomed the assurances of Great Britain that it would preserve the natural resources of the mandated territory for the native peoples and that equal treatment in commerce and trade

should be maintained for all. The United States did not admit that the terms of the mandates could be discussed only in the Council of the League of Nations and declared itself "one of the powers directly interested in the terms of the mandates." (American Secretary of State to British Secretary of State for Foreign Affairs, November 20, 1920.)

In a note to the president and members of the Council of the League of Nations on February 21, 1921, the Secretary of State of the United States stated that the approval of the United States as one of the allied and associated powers was "essential to the validity of any determinations which may be reached." In this same note, referring to mandates relating to islands in the northern Pacific Ocean, it was said:

> This Government is also in receipt of information that the Council of the League of Nations, at its meeting at Geneva on December 17 last, approved among other mandates a mandate to Japan embracing "all the former German islands situated in the Pacific Ocean and lying north of the Equator." The text of this mandate to Japan which was received by this Government and which, according to available information, was approved by the council, contains the following statement:
>
> "Whereas the principal allied and associated powers agreed that in accordance with Article XXII, Part I (Covenant of the League of Nations), of the said treaty, a mandate should be conferred upon His Majesty the Emperor of Japan to administer the said islands, and have proposed that the mandate should be formulated in the following terms," etc.
>
> The Government of the United States takes this opportunity, respectfully and in the most friendly spirit, to submit to the president and members of the council of the league that the statement above quoted is incorrect and is not an accurate recital of the facts. On the contrary, the United States, which is distinctly included in the very definite and constantly used descriptive phrase "The principal allied and associated powers," has not agreed to the terms or provisions of the mandate which is embodied in this text, nor has it agreed that a mandate should be conferred upon Japan covering all the former German islands situated in the Pacific Ocean and lying north of the Equator.

The United States has never given its consent to the inclusion of the island of Yap in any proposed mandate to Japan, but, on the other hand, at the time of the discussion of a mandate covering the former German islands in the Pacific north of the Equator, and in the course of said discussion, President Wilson, acting on behalf of this Government, was particular to stipulate that the question of the disposition of the island of Yap should be reserved for future consideration. Subsequently, this Government was informed that certain of "the principal allied and associated powers" were under the impression that the reported decision of the supreme council, sometimes described as the council of four, taken at its meeting on May 7, 1919, included or inserted the island of Yap in the proposed mandate to Japan. This Government in notes addressed to the Governments of Great Britain, France, Italy, and Japan, has set forth at length its contention that Yap had in fact been excepted from this proposed mandate and was not to be included therein. Furthermore, by direction of President Wilson, the respective Governments above mentioned, were informed that the Government of the United States could not concur in the reported decision of May 7, 1919, of the supreme council. The information was further conveyed that the reservations which had previously been made by this Government regarding the island of Yap were based on the view that the island of Yap necessarily constitutes an indispensable part of any scheme or practicable arrangement of cable communication in the Pacific, and that its free and unhampered use should not be limited or controlled by any one power.

While this Government has never assented to the inclusion of the island of Yap in the proposed mandate to Japan, it may be pointed out that even if one or more of the other principal allied and associated powers were under a misapprehension as to the inclusion of this island in the reported decision of May 7, 1919, nevertheless the notes above mentioned of the United States make clear the position of this Government in the matter. At the time when the several notes were addressed to the respective Governments above mentioned, a final agreement had not been reached as to the terms and allocation of mandates covering the former German islands in the Pacific. Therefore, the position taken in the matter by the President on behalf of this Government and clearly set forth in the notes referred to, necessarily had the result of effectively withdrawing any suggestion or implication of assent, mistakenly imputed to this Government, long before December 17, 1920, the date of the council's meeting at Geneva.

As one of "The principal allied and associated powers," the United States has an equal concern and an inseparable interest

with the other principal allied and associated powers in the overseas possessions of Germany, and concededly an equal voice in their disposition, which it is respectfully submitted can not be undertaken or effectuated without its assent. The Government of the United States therefore respectfully states that it can not regard itself as bound by the terms and provisions of said mandate and desires to record its protest against the reported decision of December 17, last, of the Council of the League of Nations in relation thereto, and at the same time to request that the council, having obviously acted under a misapprehension of the facts, should reopen the question for the further consideration, which the proper settlement of it clearly requires.

In a very friendly note of March 1, 1921, the Council of the League of Nations expressed its desire for the cooperation of the United States, but also said:

The League of Nations Council would remind your excellency that the allocation of all the mandated territories is a function of the supreme council and not of the council of the league. The league is concerned not with the allocation but with the administration of these territories. Having been notified in the name of the allied and associated powers that all the islands north of the Equator had been allocated to Japan the council of the league merely fulfilled its responsibility of defining the terms of the mandate.

*The North Pacific islands.*—There had been communications between the United States and Japan. A telegram from the American Secretary of State to the chargé d'affairs in Tokyo on November 9, 1920, was as follows:

During the recent sessions of the communications conference some question has arisen in regard to the disposition of the island of Yap by the supreme council. It has been contended that this island was included in the islands north of the Equator, which were offered by action of the supreme council of May 7, 1919, under mandate to Japan. It was the clear understanding of this Government that for reasons vitally affecting international communications the supreme council, at the previous request of President Wilson, reserved for future consideration the final disposition of the island of Yap in the hope that some agreement might be reached by the allied and associated Governments to place the island under international control and thus render it available as an international cable station. For this reason it is the understanding of the Government that the island of Yap

was not included in the action of the supreme council on May 7, 1919.

In order to avoid misunderstanding on this point, you are instructed to read the foregoing to the minister of foreign affairs and to leave a copy with him.

The Japanese Foreign Office replied on November 19, 1920:

The Department of Foreign Affairs of Japan has the honor to acknowledge the receipt of a memorandum of the United States Embassy under date of the 12th instant relative to the status of the island of Yap.

According to the definite understanding of the Japanese Government the supreme council of May 7, 1919, came to a final decision to place under the mandate of Japan the whole of the German islands north of the Equator. The decision involves no reservation whatever in regard to the island of Yap.

For the above-mentioned reasons the Department of Foreign Affairs begs to inform the United States embassy that the Japanese Government would not be able to consent to any proposition which, reversing the decision of the supreme council, would exclude the island of Yap from the territory committed to their charge.

In a note of December 6, 1920, to the American chargé d'affaires after a long argument, the Acting Secretary of State says:

I am directed by the President to inform you that the Government of the United States can not agree that the island of Yap was included in the decision of May 7 or in any other agreement of the supreme council. And in addition that, as the island of Yap must form an indispensable part of the international communications, it is essential that its free and unhampered use for such purposes should not be limited or controlled by any one power, even on the assumption that the island of Yap should be included among the islands held under mandate by Japan, it is not conceivable that other powers should not have free and unhampered access to and use of the island for the landing and operation of cables. This is a right which the United States would be disposed to grant upon any of its unfortified islands which may be essential for such purposes.

The Government of the United States expresses the hope that the above statements of fact will convince the Japanese Government of the correctness of the position of the United States with

respect to the mandate over the island of Yap and also that the Japanese Government will concur in the view of the United States that even if Yap should be assigned under mandate to Japan all other powers should have free and unhampered access to the island for the landing and operation of cables.

A similar long note from the Japanese Foreign Office on February 26, 1921, said:

In the concluding part of the note under reply it is observed that even on the assumption that the Island of Yap should be included among the islands held under the mandate by Japan, it is not conceivable that other powers should not have free and unhampered access to and use of the island for the landing and operation of cables. If this observation is put forth irrespective of the fact that the island is within the mandatory territory, then the question seems to be one which should be freely settled by the nation which has the charge of the place, namely, Japan. If this meaning be, however, that owing to the nature of the mandate the island should have its doors kept open, the Imperial Government would draw attention to the extract of the meeting of the commission on mandates held on July 8, 1919. Colonel House opposed Viscount Chinda's claim that the same equal opportunities for commerce and trade should be guaranteed in territories belonging to the C class as in those belonging to the B class. In view of the position thus taken by the American delegate the Imperial Government feel obliged to state that in their opinion the American Government can not with justice contend for the open door in the C class territories at least as against Japan and to inform the United States Government at the same time that they can not consider themselves bound in any way to recognize the freedom of other nations in the manner insisted upon by the American Government in regard to the landing and the operation of cables even in places where the principle of the open door is to be guaranteed.

In a further communication of April 2, 1921, the United States expressed itself as unable to agree with the contention of the Japanese Government and concludes after reviewing previous arguments:

In particular, as no treaty has ever been concluded with the United States relating to the island of Yap, and as no one has ever been authorized to cede or surrender the right or interest of the United States in the island, this Government must insist that it has not lost its right or interest as it existed prior to any

action of the supreme council or of the League of Nations, and can not recognize the allocation of the island or the validity of the mandate to Japan.

In this view, this Government deems it to be unnecessary at this time to consider the terms of the so-called C mandates, or the discussion with respect thereto.

This Government, as has been clearly stated in previous communications, seeks no exclusive interest in the island of Yap and has no desire to secure any privileges without having similar privileges accorded to other powers, including, of course, Japan, and relying upon the sense of justice of the Government of Japan and of the governments of the other allied and associated powers, this Government looks with confidence to a disposition of the matter whereby the just interests of all may be properly conserved.

Similar notes were also sent to Great Britain, France, and Italy.

The difference of opinion was at length adjusted at the Washington conference in the treaty of February 11, 1922.

*Treaty of August 25, 1921.*—In the treaty between the United States and Germany of August 25, 1921, article 2, paragraph 2, it is provided:

ART. 2. With a view to defining more particularly the obligations of Germany under the foregoing article with respect to certain provisions in the treaty of Versailles, it is understood and agreed between the high contracting parties:

1. That the rights and advantages stipulated in that treaty for the benefit of the United States, which it is intended the United States shall have and enjoy, are those defined in section 1 of Part IV, and Parts V, VI, VIII, IX, X, XI, XII, XIV, and XV. The United States, in availing itself of the rights and advantages stipulated in the provisions of that treaty mentioned in this paragraph, will do so in a manner consistent with the rights accorded to Germany under such provisions.

2. That the United States shall not be bound by the provisions of Part I of that treaty nor by any provisions of that treaty, including those mentioned in paragraph 1 of this article, which relate to the covenant of the League of Nations, nor shall the United States be bound by any action taken by the League of Nations or by the council or by the assembly thereof, unless the the United States shall expressly give its assent to such action.

As mandates in the South Pacific and elsewhere are in part intrusted to political unities with which the United States has at present no direct diplomatic relations, as in the case of Australia and New Zealand, the problem of negotiating agreements similar to those with France and Belgium arises, but an arrangement may not be difficult.

*Treaty of February 11, 1922.*—As regards some powers, the agreements relating to mandates are in part conditioned upon the convention between the United States and Japan of February 11, 1922, and the notes exchanged in reference thereto.

BY THE PRESIDENT OF THE UNITED STATES OF AMERICA

A PROCLAMATION

Whereas a convention between the United States of America and Japan with regard to the rights of the two Governments and their respective nationals in the former German islands in the Pacific Ocean, lying north of the Equator, in particular the island of Yap, was concluded and signed by their respective plenipotentiaries at Washington, on the 11th of February, 1922, the original of which convention is word for word as follows:

The United States of America and Japan;

Considering that by article 119 of the treaty of Versailles, signed on June 28, 1919, Germany renounced in favor of the powers described in that treaty as the principal allied and associated powers, to wit, the United States of America, the British Empire, France, Italy, and Japan, all her rights and titles over her oversea possessions;

Considering that the benefits accruing to the United States under the aforesaid article 119 of the treaty of Versailles were confirmed by the treaty between the United States and Germany, signed on August 25, 1921, to restore friendly relations between the two nations;

Considering that the said four powers, to wit, the British Empire, France, Italy, and Japan, have agreed to confer upon His Majesty the Emperor of Japan a mandate, pursuant to the treaty of Versailles, to administer the groups of the former German

islands in the Pacific Ocean lying north of the Equator, in accordance with the following provisions:

"ARTICLE 1. The islands over which a mandate is conferred upon His Majesty the Emperor of Japan (hereinafter called the mandatory) comprise all the former German islands situated in the Pacific Ocean and lying north of the Equator.

"ART. 2. The mandatory shall have full power of administration and legislation over the territory subject to the present mandate as an integral portion of the Empire of Japan, and may apply the laws of the Empire of Japan to the territory, subject to such local modifications as circumstances may require."

The mandatory shall promote to the utmost the material and moral well-being and the social progress of the inhabitants of the territory subject to the present mandate.

"ART. 3. The mandatory shall see that the slave trade is prohibited and that no forced labor is permitted, except for essential public works and services, and then only for adequate remuneration."

The mandatory shall also see that the traffic in arms and ammunition is controlled in accordance with principles analogous to those laid down in the convention relating to the control of the arms traffic, signed on September 10, 1919, or in any convention amending same.

The supply of intoxicating spirits and beverages to the natives shall be prohibited.

"ART. 4. The military training of the natives, otherwise than for purposes of internal police and the local defence of the territory, shall be prohibited. Furthermore, no military or naval bases shall be established or fortifications erected in the territory.

"ART. 5. Subject to the provisions of any local law for the maintenance of public order and public morals, the mandatory shall ensure in the territory freedom of conscience and the free exercise of all forms of worship, and shall allow all missionaries, nationals of any state member of the League of Nations, to enter into, travel, and reside in the territory for the purpose of prosecuting their calling.

"ART. 6. The mandatory shall make to the Council of the League of Nations an annual report to the satisfaction of the council, containing full information with regard to the territory, and indicating the measures taken to carry out the obligations assumed under articles 2, 3, 4, and 5.

"ART. 7. The consent of the Council of the League of Nations is required for any modification of the terms of the present mandate."

The mandatory agrees that if any dispute whatever should arise between the mandatory and another member of the League of

Nations relating to the interpretation or the application of the provisions of the mandate, such dispute, if it can not be settled by negotiation, shall be submitted to the Permanent Court of International Justice provided for by article 14 of the covenant of the League of Nations;

Considering that the United States did not ratify the treaty of Versailles and did not participate in the agreement respecting the aforesaid mandate;

Desiring to reach a definite understanding with regard to the rights of the two governments and their respective nationals in the aforesaid islands, and in particular the island of Yap, have resolved to conclude a convention for that purpose and to that end have named as their plenipotentiaries:

The President of the United States of America: Charles Evans Hughes, Secretary of State of the United States; and

His Majesty the Emperor of Japan: Baron Kijuro Shidehara, His Majesty's ambassador extraordinary and plenipotentiary at Washington;

Who, after having communicated to each other their respective full powers, found to be in good and due form, have agreed as follows:

ARTICLE I

Subject to the provisions of the present convention, the United States consents to the administration by Japan, pursuant to the aforesaid mandate, of all the former German islands in the Pacific Ocean lying north of the Equator.

ARTICLE II

The United States and its nationals shall receive all the benefits of the engagements of Japan, defined in articles 3, 4, and 5 of the aforesaid mandate, notwithstanding the fact that the United States is not a member of the League of Nations.

It is further agreed between the high contracting parties as follows:

(1) Japan shall insure in the islands complete freedom of conscience and the free exercise of all forms of worship which are consonant with public order and morality; American missionaries of all such religions shall be free to enter the islands and to travel and reside therein, to acquire and possess property, to erect religious buildings and to open schools throughout the islands; it being understood, however, that Japan shall have the right to exercise such control as may be necessary for the main-

tenance of public order and good government and to take all measures required for such control.

(2) Vested American property rights in the mandated islands shall be respected and in no way impaired.

(3) Existing treaties between the United States and Japan shall be applicable to the mandated islands.

(4) Japan will address to the United States a duplicate of the annual report on the administration of the mandate to be made by Japan to the Council of the League of Nations.

(5) Nothing contained in the present convention shall be affected by any modification which may be made in the terms of the mandate as recited in the convention, unless such modification shall have been expressly assented to by the United States.

ARTICLE III

The United States and its nationals shall have free access to the island of Yap on a footing of entire equality with Japan or any other nation and their respective nationals in all that relates to the landing and operation of the existing Yap-Guam cable or of any cable which may hereafter be laid or operated by the United States or by its nationals connecting with the island of Yap.

The rights and privileges embraced by the preceding paragraph shall also be accorded to the Government of the United States and its nationals with respect to radiotelegraphic communication; provided, however, that so long as the Government of Japan shall maintain on the island of Yap an adequate radiotelegraphic station, cooperating effectively with the cables and with other radio stations on ships or on shore, without discriminatory exactions or preferences, the exercise of the right to establish radiotelegraphic stations on the island by the United States or its nationals shall be suspended.

ARTICLE IV

In connection with the rights embraced by Article III, specific rights, privileges, and exemptions, in so far as they relate to electrical communications, shall be enjoyed in the island of Yap by the United States and its nationals in terms as follows:

(1) Nationals of the United States shall have the unrestricted right to reside in the island, and the United States and its nationals shall have the right to acquire and hold on a footing of entire equality with Japan or any other nation or their respective nationals all kinds of property and interests, both personal and real, including lands, buildings, residences, offices, works, and appurtenances,

(2) Nationals of the United States shall not be obliged to obtain any permit or license in order to be entitled to land and operate cables on the island, or to establish radiotelegraphic service, subject to the provisions of Article III, or to enjoy any of the rights and privileges embraced by this article and by Article III.

(3) No censorship or supervision shall be exercised over cable or radio messages or operations.

(4) Nationals of the United States shall have complete freedom of entry and exit in the island for their persons and property.

(5) No taxes, port, harbor, or landing charges or exactions of any nature whatsoever shall be levied either with respect to the operation of cables or radio stations or with respect to property, persons, or vessels.

(6) No discriminatory police regulations shall be enforced.

(7) The Government of Japan will exercise its power of expropriation in the island to secure to the United States or its nationals needed property and facilities for the purpose of electrical communications if such property or facilities can not otherwise be obtained.

It is understood that the location and the area of land so to be expropriated shall be arranged between the two Governments according to the requirements of each case. Property of the United States or of its nationals and facilities for the purpose of electrical communication in the island shall not be subject to expropriation.

ARTICLE V

The present convention shall be ratified by the high contracting parties in accordance with their respective constitutions. The ratifications of this convention shall be exchanged in Washington as soon as practicable, and it shall take effect on the date of the exchange of the ratifications.

In witness whereof the respective plenipotentiaries have signed this convention and have hereunto affixed their seals.

Done in duplicate at the city of Washington this 11th day of February, 1922.

CHARLES EVANS HUGHES. [SEAL.]
K. SHIDEHARA. [SEAL.]

And whereas the said convention has been duly ratified on both parts and the ratifications of the two Governments were exchanged in the city of Washington, on the 13th day of July, 1922;

Now, therefore, be it known that I, Warren G. Harding, President of the United States of America, have caused the said convention to be made public, to the end that the same and every

article and clause thereof may be observed and fulfilled with good faith by the United States and the citizens thereof.

In testimony whereof I have hereunto set my hand and caused the seal of the United States to be affixed.

Done at the city of Washington, this 13th day of July, in the year of our Lord 1922, and of the independence of the United States the one hundred and forty-seventh.

[SEAL.] WARREN G. HARDING.

By the President:

CHARLES E. HUGHES,
*Secretary of State.*

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[Exchanges of notes]

[*The Japanese Ambassador to the Secretary of State*]

JAPANESE EMBASSY,
*Washington, February 11, 1922.*

SIR: In proceeding this day to the signature of the convention between Japan and the United States with respect to the islands, under Japan's mandate, situated in the Pacific Ocean and lying north of the Equator, I have the honor to assure you, under authorization of my Government, that the usual comity will be extended to nationals and vessels of the United States in visiting the harbors and waters of those islands.

Accept, sir, the renewed assurances of my highest consideration.

K. SHIDEHARA.

Hon. CHARLES E. HUGHES,
*Secretary of State.*

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[*The Secretary of State to the Japanese Ambassador*]

DEPARTMENT OF STATE,
*Washington, February 11, 1922.*

EXCELLENCY: I have the honor to acknowledge the receipt of your excellency's note under date of February 11, 1922, stating that the Japanese Government are quite willing to extend to American nationals and vessels the usual comity in visiting the harbors and waters of the Japanese mandated islands.

Accept, excellency, the renewed assurances of my highest consideration.

CHARLES E. HUGHES.

His Excellency BARON KIJURO SHIDEHARA,
*Ambassador of Japan.*

[*The Secretary of State to the Japanese Ambassador*]

DEPARTMENT OF STATE,
*Washington, February 11, 1922.*

EXCELLENCY: In proceeding this day to the signature of the convention between the United States and Japan with respect to former German possessions under a mandate to Japan, I have the honor to state that if in the future the Government of the United States should have occasion to make any commercial treaties applicable to Australia and New Zealand, it will seek to obtain an extension of such treaties to the mandated islands south of the Equator, now under the administration of those Dominions. I should add that the Government of the United States has not yet entered into a convention for the giving of its consent to the mandate with respect to these islands.

I have the honor further to state that it is the intention of the Government of the United States, in making conventions, relating to former German territories under mandate, to request that the governments holding mandates should address to the United States, as one of the principal allied and associated powers, duplicates of the annual reports of the administration of their mandates.

Accept, excellency, the renewed assurance of my highest consideration.

CHARLES E. HUGHES.

His Excellency BARON KIJURO SHIDEHARA,
*Ambassador of Japan.*

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[*The Japanese Ambassador to the Secretary of State*]

JAPANESE EMBASSY,
*Washington, February 11, 1922.*

SIR: I have the honor to acknowledge the receipt of your note of this date, stating that if in the future the Government of the United States should have occasion to make any commercial treaties applicable to Australia and New Zealand, it will seek to obtain an extension of such treaties to the islands south of the Equator, under the mandate of Australia and New Zealand, and further that it is the intention of the Government of the United States, in making hereafter conventions relating to former German territories under mandate, to request that the mandatories should address to the United States, as one of the principal allied and associated powers, duplicates of the annual reports on the administration of such mandated territories.

In taking note of your communication under acknowledgment, I beg you, Sir, to accept the renewed assurances of my highest consideration.

K. SHIDEHARA.

Hon. CHARLES E. HUGHES,
*Secretary of State.*

*Japan in the Pacific.*—In the second annual report on Japan's mandated territory there is an outline of general administration which states:

When the German Pacific islands north of the Equator were occupied by the Japanese expeditionary squadron in October, 1914, the commander of the squadron immediately established military administration on the islands. On December 28, 1914, a provisional naval garrison was established to take over the defense and administration of the islands from the expeditionary squadron.

The headquarters of the provisional naval garrison was established on Truk, the islands being divided into six administrative jurisdictions—those of Saipan, Palau, Yap, Truk, Ponape, and Jaluit—and guards were stationed in the respective jurisdictions. The chiefs of these guards were instructed to discharge their administrative functions in conformity, in so far as was compatible with military requirements, with the rules and customs which were in force before the Japanese occupation; and also specially to respect the various powers which were possessed by native chieftains over their tribesmen, with a view to gradually fostering the spirit of self-government among the natives.

It was due to unavoidable military requirements that the chiefs of guards were put in direct charge of administrative affairs on the islands. Subsequently, however, the last vestige of the German squadron in the Pacific having disappeared, a civil administration department, under the control of the commander of the naval garrison, was established on July 1, 1918, together with a civil administration station in each of the six administrative jurisdictions. The staffs of these offices were all composed of civil officials, who took over the charge of general administrative affairs from the guards which thereafter devoted themselves exclusively to local policing.

The mandate for the German Pacific islands north of the Equator being assigned to Japan by the League of Nations Council on December 17, 1920, the Japanese Government have taken various steps to fulfil the terms of the mandate. The withdrawal of guards from the islands was commenced in 1921, and by March, 1922, all the troops will be withdrawn from the entire region. At the same time the provisional naval garrison will be abolished,

while a south seas bureau, under the supervision of the prime minister, will be brought into existence to take charge of general administrative affairs in the mandated territory (p. 1.)

Later, in the same report, it is explained that—

The principles set down in the mandate for the German Pacific islands north of the Equator are similar to those followed by Japan ever since the islands came under her control in 1914—so much so that when the assignment of the mandate to Japan was decided upon in 1920 there was scarcely any need of modifying our administrative principles. However, since some of the laws and regulations promulgated during the war remain unrevised, and since some basic investigations relating to general administrative affairs have not yet been completed owing to the very low standard of human development among the islanders and also because of the defective system of communication between the various islands, some inadequacy is still felt in regard to the existing institutions, and the Japanese Government are doing their best to remove these drawbacks characteristic of a transition period (p. 3).

All naval units were reported by Japan to have been withdrawn in April, 1922, and the maintenance of peace and order to have been placed in the hands of an organized police force.

*Mandate and mandatory.*—In the discussion in the permanent mandates commission of the League of Nations June 10, 1926, the matter of relation of the mandate to the mandatory arose.

RELATION BETWEEN SOUTH AFRICA, AS MANDATORY, AND THE MANDATED TERRITORY OF SOUTHWEST AFRICA

M. Van Rees said he would ask the commission before considering the report to note a declaration which had been made by General Smuts in the South African Parliament during a debate which had taken place from July 13 to July 27 of last year. General Smuts, referring to the Union of South Africa and the mandated territory, had expressed himself as follows:

"I should have preferred the two countries more closely linked up at this stage. When I urge this it may be said that I am working in favor of the annexation of Southwest Africa to the Union; but I am not. I do not think it is necessary for us to annex Southwest to the Union. The mandate for me is enough, and it

should be enough for the Union. It gives the Union such complete power of sovereignty not only administrative but legislative that we need not ask for anything more. When the covenant of the League of Nations and subsequently the mandate gave to us the right to administer that country as an integral portion of the Union, everything was given to us. I remember at the peace conference one of the great powers tried to modify the position, and instead of saying 'as an integral portion' an amendment was made to introduce the word 'if' so that it should read 'as if an integral portion of the mandatory power.' But after consideration the 'if' was struck out. We therefore have the power to govern Southwest Africa actually as an integral portion of the Union. Under these circumstances I maintain—and I have always maintained—that it will never be necessary for us, as far as I can see, to annex Southwest. We can always continue to fulfill the conditions imposed on us by the mandate, and we can always render annual reports to the League of Nations in respect of the mandate."

The mandates commission had always interpreted paragraph 6 of article 22 of the covenant in the sense that the mandated territory should be administered as if it were an integral portion of the territory of the mandatory. According to the interpretation, however, given by General Smuts to this passage, Southwest Africa constituted a part of the Union of South Africa, for he rejected the interpretation according to which this position only rested on a supposition.

In this case, however, nothing would remain but a territory which was incorporated politically and in actual fact in the Union, and consequently there would be no longer a territory under mandate. It was for this reason that M. Van Rees thought that the commission could not pass over in silence the declaration of General Smuts.

Sir F. Lugard did not think that the insertion or omission of the word "if" made any real difference in practice. The point of substance was that a mandatory power was bound to carry out the terms of the mandate, to present an annual report to the League of Nations, and that the right of petition was recognized as belonging to the inhabitants. So long as these points of substance were admitted, a mandated territory was in practice in quite a different position from that of a colony.

M. Orts did not think that what had been said during the discussions preceding the adoption of the covenant could be used as an argument. No minutes had been kept of the conferences at the Hotel Crillon, which meant that as far as the Covenant of the

League of Nations was concerned this ordinary source of interpretation was completely lacking.

In order to interpret the covenant, the permanent mandates commission could not take into account the personal recollections of the statesmen who had taken part in those conferences. It could not be influenced by the arguments put forward by General Smuts with regard to a first draft of article 22, of which no trace remained, any more than there remained any trace of the considerations which had caused that draft to be modified.

M. Rappard agreed with M. Orts. The views of General Smuts on C mandates were well known. He had indeed stated several years previously that in his eyes the institution of such mandates was equivalent, in all but name, to annexation or something very like it. M. Rappard observed, with regard to the point raised by M. Orts, that article 22 of the covenant had not even been discussed by the committee on the League of Nations at the peace conference, but had been drafted by the supreme council. The conversations between the statesmen assembled at Paris which had taken place with regard to this matter could not be regarded as binding on members of the League of Nations.

He did not think that a matter of principle was actually affected by the declaration of General Smuts. The covenant, by the terms of which mandated territories were administered in the name of the League of Nations, remained untouched. General Smuts was perfectly free to state that an integral part of the territory of South Africa was administered in the name of the League of Nations, although, in the view of M. Rappard, it would appear more logical to say that it was administered in the name of the League of Nations as if it formed an integral part of the territory. (Minutes 9th Session, Permanent Mandates Commission, C. 405, M. 144, 1926, VI, p. 33–34.)

*Belgian attitude, 1924.*—In a note annexed to a letter to the secretary-general of the League of Nations, June 7, 1924, the following view was expressed by Belgium:

All acts of administration regularly performed on behalf of the mandated territory by its accredited representative have the same force as those performed by a power capable of governing itself. As in the case of a trusteeship, properly speaking, such acts—the legal relations which they created with third parties, the engagements which they undertook, and the guaranties which they established—subsisted, whatever, might be the ultimate changes made in the régime of the territories to which assistance was given. (Minutes, 5th Session, Permanent Mandates Commission, C. 617, M. 216, 1924, VI, p. 154.)

*Powers of mandatory.*—The powers of a mandatory state may be seen from article 2 of the mandate for the Pacific islands north of the Equator, which were allocated to Japan:

> The mandatory shall have full power of administration and legislation over the territory subject to the present mandate as an integral portion of the Empire of Japan, and may apply the laws of the Empire of Japan to the territories, subject to such local modification as circumstances may require.

The mandatory must give heed to the welfare of the natives, etc., and, "furthermore, no military or naval bases shall be established or fortifications erected in the territory."

The mandatory must also make "an annual report to the satisfaction of the council" concerning its administration, and by the Yap agreement must also address a duplicate of this report to the United States.

On December 16, 1920, a report of the subcommittee of the League of Nations on mandates said:

> In the first place, they feel that the mandatory should not be allowed to make use of its position in order to increase its military strength.

*Administered as integral portions.*—Manifestly if states are to be intrusted with mandated areas, the states must have authority to administer these territories. Article 22 of the covenant of the league foresees that these "can be best administered under the laws of the mandatory as integral portions of its territory." There is thus visualized possible unity of administration, but, by virtue of the specific provision, the unification is thereby limited and incorporation is not implied.

The list of questions suggested by the permanent mandates commission in 1926 had for its object to obtain from the mandatories in their annual reports data of a character that would be more helpful. The earlier questionnaire had not proven entirely satisfactory. The questions proposed in 1926 involved information in regard to military forces maintained, expenditure upon police

and military forces, nature of control of arms, etc. The British and other Governments objected to the detailed nature of these 236 questions as well as to the idea that representatives of the mandated populations might appear before the mandates commission. Great Britain consulted the Dominion Governments and in a communication of November 8, 1926, said:

3. In order properly to appreciate the issues at stake it seems to these Governments necessary to examine shortly the theory and purpose of mandates and to form a clear idea of the mandatory principle.

4. The purpose of the mandatory system and the duties thereby devolving respectively upon the mandatory Governments and the league are set forth in article 22 of the covenant. It is there stated that the well-being and development of inhabitants of mandated territories are a sacred trust of civilization, and that the best method of achieving this object is "that the tutelage of such peoples should be intrusted to advanced nation who, by reason of their resources, their experience, or their geographical position, can best undertake this responsibility, and who are willing to accept it, and that this tutelage should be exercised by them as mandatories on behalf of the league.

5. After laying down this general principle, the covenant proceeds to distinguish between the three different classes of territories which have been allotted under A, B, and C mandates, respectively. In regard to B mandates the covenant says (par. 5 of art. 22) that "the mandatory must be responsible for the administration of the territory under conditions which will guarantee freedom of conscience and religion," subject to certain considerations. Territories under C mandates "can best be administered under the laws of the mandatory as integral portions of its territory, subject to the safeguards above mentioned." (Par. 6 of art. 22.)

6. Finally, "the mandatory shall render to the council an annual report in reference to the territory committed to its charge," and "a permanent commission shall be constituted to receive and examine the annual reports of the mandatories and to advise the council on all matters relating to the observance of the mandates."

7. In his report to the council in August, 1920, the Belgian delegate (M. Hymans), who acted as rapporteur, suggested that, in the case of B mandates, "the mandatory power will enjoy, in my judgment, a full exercise of sovereignty, in so far as such exercise is consistent with the carrying out of the obligations im-

posed by paragraphs 5 and 6 (of art. 22 of the covenant). In paragraph 6, which deals with C mandates, the scope of these obligations is perhaps narrower than in paragraph 5, thus allowing the mandatory power 'more nearly to assimilate the mandated territory to its own'." (British Parliamentary Papers, Miscellaneous No. 10 (1926). Permanent Mandates Commission, Cmd. 2767, p. 14.)

Later the Council of the League of Nations expressed itself as unfavorable to permitting representatives of mandated populations to appear before the mandates commission though maintaining the right of petition. The tendency has been for the mandates commission to favor constructive measures in the direction of improving the condition of the mandated territories while refraining from unnecessary interference with methods and policies of the mandatory powers.

*Mr. Miller on troops in mandates.*—Mr. David Hunter Miller, who was technical adviser to the American commission at the Paris Peace Conference, writing of the discussion at the conference in regard to native troops in mandated areas, said:

Furthermore, there is no doubt that the French contention regarding recruiting of troops in their mandated territories in Africa was accepted at the afternoon meeting of the Council of Ten of January 30. The language of Clemenceau could hardly have been more explicit; in the original unrevised text of the minutes the rather long discussion ended thus:

"Mr. Lloyd-George said that there was nothing in the clause under review to prevent that. The words used there were 'for other than police purposes and the defense of territory.' He really thought that those words would cover the case of France. There was nothing in the document which would prevent their doing exactly the same thing as they had done before. What it did prevent was the kind of thing the Germans were likely to do, namely, organize great black armies in Africa, which they could use for the purpose of clearing everybody else out of that country. That was their proclaimed policy; and if that was encouraged amongst the other nations, even though they might not have wars in Europe, they would have the sort of thing that happened in the seventeenth and eighteenth centuries in India, when France and Great Britain were at war in India, whilst being

fairly good friends in Europe. Then they were always raising great native armies against each other. That must now be stopped. There was nothing in this document which prevented France doing what she did before. The defense of the territory was provided for.

"M. Clemenceau said that if he could raise troops, that was all he wanted.

"Mr. Lloyd-George replied that he had exactly the same power as previously. It only prevented any country drilling the natives and raising great armies.

"M. Clemenceau said that he did not want to do that. All that he wished was that the matter should be made quite plain, and he did not want anybody to come and tell him afterwards that he had broken away from the agreement. If this clause meant that he had a right of raising troops in case of general war, he was satisfied.

"Mr. Lloyd-George said that so long as M. Clemenceau did not train big nigger armies for the purposes of aggression, that was all the clause was intended to guard against.

"M. Clemenceau said that he did not want to do that. He therefore understood that Mr. Lloyd-George's interpretation was adopted.

"President Wilson said that Mr. Lloyd-George's interpretation was consistent with the phraseology.

"M. Clemenceau said that he was quite satisfied." (The Origin of the Mandate System, 6 Foreign Affairs, January, 1928, p. 288.)

*Recruiting of inhabitants of mandates.*—In June, 1926, the Council of the League of Nations reaffirmed the views of the permanent mandates commission:

*Military recruiting.*—With regard to the question of recruiting, the permanent mandates commission, at its third session (1923), expressed the opinion that—

"The spirit, if not the letter, of the mandate would be violated if the mandatory enlists the natives of the mandated territory (wherever they may present themselves for engagement) for services in any military corps or body of constabulary which is not permanently quartered in the territory and used solely for its defense or the preservation of order within it." (Monthly Summary, VI, 6, p. 148.)

The question of recruiting was discussed in the meetings of the commission. On June 26, 1925, the records state:

M. Van Rees wished to put three questions of a general nature to the commissioner of the French Republic.

In regard to the military organization in the French mandated territories, he recalled that last year the secretary had distributed to the commission certain documents containing extracts from various Swedish and other newspapers which were agitated by an official report presented to the French Chamber of Deputies on the subject of the sources of recruitment of natives in the French colonies. This document referred not only to the colonies but also to the mandated territories. It was stated in particular that "the future international situation of this possession (the Cameroons) should enable France to draw on it for military obligations demanded from the French possessions in Africa." Further, "the colonies should supply France with a native army methodically recruited, minutely organized, and specially trained. In a future conflict France should, contrary to what occurred in 1914, have this weapon ready to hand, etc."

He wished to know whether the suggestions made in this report had had any practical result and added that he had in mind the special clauses in the mandates for Togoland and the Cameroons regarding military recruitment.

M. Duchêne thanked M. Van Rees for raising this question, which dealt with an observation he had himself desired to make to the commission. As mentioned by M. Van Rees, the mandates for Togoland and the French Cameroons contained a special clause permitting France to utilize in a general war the public forces recruited in the Cameroons or Togoland. By reason of these provisions, the French military authorities had considered that they should maintain the public forces of French West or equatorial Africa, and the two mandated territories under the same command, with the formal reservation that in peace time the soldiers recruited in Togoland and the Cameroons should be exclusively employed in these two territories. This conclusion, which was only an apparent one, between the military organization of the French African colonies and the two mandated territories having attracted some attention, the French Government wished to remove any misunderstanding.

By virtue of a measure which applied from January 1 of this year and which in consequence did not appear in the report of 1924, a complete distinction had been made between the native soldiers who might be recruited in Togoland and the Cameroons to be employed there in peace time and French native troops recruited elsewhere. Since that date these forces were not only no longer shown on the French budget but they constituted a sepa-

rate militia absolutely distinct from the French native colonial army. In Togoland the commissioner of the French Republic had gone still further and considered that this public force might be dispensed with. This removed all confusion, both apparent and real, between the forces recruited in the Cameroons and in Togoland and the French colonial army in general. * * *

M. Bonnecarrère added further details to the explanations given by M. Duchêne, and stated that in 1923 one of the two companies that then existed in Togoland had been sent to Dahomi, but, in order scrupulously to observe the clauses of the mandate, the soldiers of this company that were natives of Togoland were withdrawn from the troop and attached to the company stationed in the north of the territory.

Further, as had been stated by the accredited representative of the French Government, the last company that existed in Togoland had been disbanded thanks to the state of security existing in the territory. There were at the present moment no military forces in Togoland. There existed only a police force which was in no way intended for military purposes, but was employed exclusively for civil duties and the maintenance of the internal security of the territory and so on. (Minutes, Permanent Mandates Commission, C. 386, M. 132, 1925, VI, p. 15.)

*Mandates and war.*—The question of sovereignty of mandated areas is not involved because areas become liable in time of war not by virtue of sovereignty over the area but by virtue of authority exercised within the area. In an area under belligerent occupation the sovereignty may reside in the belligerent on the offensive, in the belligerent on the defensive, or even in a neutral as in the Russo-Japanese War, yet, if occupied by one belligerent, the nonoccupying belligerent may treat the territory as hostile area for purposes of the war.

The status of class C mandates in time of war has been much discussed. Manifestly an area merely a mandate could not issue a proclamation of neutrality or a declaration of war for the mandate is to be administered under the mandatory's laws as an integral portion of the mandatory. It is difficult to conceive how if the mandatory by law declares war or proclaims neutrality this applies only to a part of the area under its administrative control and over which no other state has control. There

may be restrictions accepted by the mandatory on taking over the control and these should be strictly construed. The islands under class C mandates were to a degree demilitarized, but they were not neutralized. This is evident from the terms of the mandate which permit training of the natives for local defense. In a treaty specific clauses prevail against general.

*The "Sudmark."*—On August 15, 1914, the German steamship *Sudmark* was captured by a British vessel of war in the Red Sea. The *Sudmark* was brought through the Suez Canal to Alexandria in Egypt. In the judgment of the judicial committee of the privy council, it was said:

> Seizures as prize are made by executive officers of the Crown in the exercise of the Crown's belligerent rights. The duties of these executive officers toward the owners of the property seized are the duties of the sovereign, and fall to be determined by international law. On the other hand, the duties of these executive officers toward the Crown must be determined by municipal law. (1917 A. C., p. 620.)

Prize court jurisdiction was conferred upon the British court in Egypt by an act of Parliament of September 18, 1914, and by an order in council of September 30, 1914. Great Britain proclaimed Egypt a protectorate December 18, 1914.

In the case of the *Sudmark*, question was raised in regard to bringing the ship to a proper port and the judgment stated:

> The convenience of the port to which a prize is brought in for adjudication must be determined by all the circumstances of the case. Neutral ports are not convenient ports, for it is arguable that a neutral power could not allow a prize to remain in its ports—except temporarily, and then only by reason of special circumstances such as stress of weather or want of provisions—without committing a breach of neutrality; and, further, it might be difficult to execute the order of the prize court of the captors over vessels in a neutral port. Other things being equal, the nearest available port should be preferred. A ship captured in the English Channel ought not as a rule to be taken to Gibraltar. It would be unreasonable to subject her to the risk of so long a voyage. But, as between various home ports, it would be quite

proper to select the least congested port, or the port the voyage to which, although longer, would involve less danger from the risks incident to war. A convenient port must be such that the property can remain there in safety without being exposed to special risk from wind or tide. It should be capable of accommodating vessels of the draft of the captured ship. The real point to be considered is the safety of the prize and the distance of the place where the prize court holds its sittings from the port selected is immaterial.

To the question whether Alexandria was a convenient port to which the *Sudmark* might properly be brought after her capture, their lordships, without hesitation, return an affirmative answer. (Ibid.)

*Doubtful status.*—There have arisen from time to time controversies in regard to areas where a belligerent state exercised authority even though not sovereign. It would seem difficult to reconcile claims sometimes made that would imply that an area might at the same time have a belligerent and a neutral status. Such claims have been made for areas in southeastern Europe as in regard to the island of Cyprus.

During the World War the question arose in the case of the *Gutenfels* as to whether Egypt, because of its relation to Great Britain, would be regarded as belligerent or neutral. This question in 1916 came before the judicial committee of the privy council, which said:

Secondly, the question has been argued whether Port Said was, within the meaning of The Hague convention, an "enemy port," that is, a port enemy to Germany. Having regard to the relations between Great Britain and Egypt, to the anomalous position of Turkey, and to the military occupation of Egypt by Great Britain, their lordships do not doubt that it was. In Hall's International Law (6th ed., p. 505) the learned author writes:

"When a place is militarily occupied by an enemy the fact that it is under his control, and that he consequently can use it for the purposes of his war, outweighs all considerations founded on the bare legal ownership of the soil."

Their lordships think this to be right. (1916, 2 A. C. 113.)

Hall further says:

In like manner, but with stronger reason, where sovereignty is double or ambiguous a belligerent must be permitted to fix

his attention upon the crude fact of the exercise of power. He must be allowed to deal his enemy blows wherever he finds him in actual military possession, unless that possession has been given him for a specific purpose, such as that of securing internal tranquillity, which does not carry with it a right to use the territory for his military objects. On the other hand, where a scintilla of sovereignty is possessed by a belligerent state over territory where it has no real control an enemy of the state, still fixing his attention on facts, must respect the neutrality with which the territory is practically invested. (International Law, 8th ed., p. 607.)

*United States and mandates.*—There has been much diplomatic correspondence in regard to the relation of the United States to mandates. The United States has concluded treaties in regard to mandates with powers holding mandated areas in Africa, Asia Minor, and the Pacific.

In Article I of the treaty of February 11, 1921, the United States consented to the administration by Japan of mandates. The United States has in this treaty obtained some special privileges in this mandated area, implying (as the treaty was made in the presence of the three other principal allied and associated powers) Japan's competence to grant this exceptional footing. As there are no treaty provisions for change of status in time of war, the right of jurisdiction and administration in peace and in war is involved and the mandated area has become assimilated with the status of the mandatory. Even the right of eminent domain is recognized, as in Japan, so far as the area of Yap is concerned.

The treaty of February 6, 1922, supplementary to the four-power treaty of December 13, 1921, specifically extends the provisions of the four-power treaty to areas under Japanese sovereignty, as Formosa, and provides a like status as regards the treaty for the mandated islands. The four-power treaty itself relates by its terms to "insular possessions and insular dominions in the region of the Pacific Ocean."

Sovereignty over an area under a mandate is not necessary for the determination of its neutrality as the status

of an area is based upon jurisdictional control whether in time of peace or in time of war, as in the case of military occupation. In the terms of the mandate there is a restriction on the establishing of naval bases and fortifications but probably this would not be presumed to extend to a time of war when this might be necessary for the defense of the islands and the existence therein of the rights which the mandatory has agreed to maintain. In the treaty of 1922 limiting naval armaments there are provisions (Art. XIX) in regard to fortifications and naval bases in nonmandated areas.

The United States does not receive its rights with regard to the mandated areas under the same conditions as the powers members of the League of Nations, but the rights of the United States are defined by the treaties as to Yap. Japan has with the knowledge of the other powers independently negotiated with the United States a treaty as to the mandates north of the Equator. In the declaration accompanying the four-power treaty it is specifically provided that the making of the treaty "shall not be deemed to be an assent on the part of the United States of America to the mandates and shall not preclude agreements between the United States of America and the mandatory powers, respectively, in relation to the mandated islands."

In the case of differences as to the islands of the Pacific, the parties under the four-power treaty have agreed to a joint conference "to which the whole subject will be referred for consideration and adjustment."

While the status of islands under mandates is not clearly defined, it is clear that it is not the same as at the time of the World War under the sole control of the individual states. There were other changes in status and relations introduced by the Washington treaties of 1922.

*Area under Article XIX.*—By the terms of the treaty limiting naval armament of 1922 the islands forming a chain beyond the Hawaiian group to and including the

Philippines were to maintain the status quo as naval bases. These islands between the Hawaiian Islands and the Philippines have an area of a little more than 800 square miles. The number of these islands is about 1,400, many being merely exposed rocks, and they dot an area extending east and west about 2,500 miles. As regards the Pacific, some of these are strategically located if they may lawfully be used for war. So far as those islands which formerly belonged to Germany, they are under mandates of the type of class C to be "administered under the laws of the mandatory as integral portions of its territory" and the mandatory is Japan.

*Fortifications in the Pacific.*—In discussion of the 5–5–3 ratio for the limitation of armament in 1921–22 it was realized that the limitation of ships was related to the limitation of bases. In the report of the American delegation submitted to the President, February 9, 1922, it was stated:

> Before assenting to this ratio the Japanese Government desired assurances with regard to the increase of fortifications and naval bases in the Pacific Ocean. It was insisted that while the capital-ship ratio proposed by the American Government might be acceptable under existing conditions it could not be regarded as acceptable by the Japanese Government if the Government of the United States should fortify or establish additional naval bases in the Pacific Ocean.
>
> The American Government took the position that it could not entertain any question as to the fortification of its own coasts or of the Hawaiian Islands, with respect to which it must remain entirely unrestricted. Despite the fact that the American Government did not entertain any aggressive purpose whatever, it was recognized that the fortification of other insular possession in the Pacific might be regarded from the Japanese standpoint as creating a new naval situation, and as constituting a menace to Japan, and hence the American delegation expressed itself as willing to maintain the status quo as to fortifications and naval bases in its insular possessions in the Pacific, except as above stated, if Japan and the British Empire would do the like. It was recognized that no limitation should be made with respect to the insular possessions adjacent to the coast of the

United States, including Alaska and the Panama Canal Zone or the Hawaiian Islands. The case of the Aleutian Islands, stretching out toward Japan, was a special one and had its counterpart in that of the Kurile Islands belonging to Japan and reaching out to the northeast toward the Aleutians. It was finally agreed that the status quo should be maintained as to both these groups. (1921, N. W. C., Int. Law Documents, p. 265.)

*Washington treaties and nonsignatories.*—The treaties drawn up at the Washington Conference on the Limitation of Armament in 1921–22 were, as are other treaties after ratification, binding upon the signatories. At the meeting of the committee on limitation of armament, January 31, 1922, the so-called submarine treaty was under discussion.

Mr. Balfour said that he was much embarrassed about this. He agreed, of course, to the substance of all the chairman had read. There was a question, however, that he would like to ask Mr. Root. He asked if that would be in order and was assured that it would.

Continuing, Mr. Balfour said the question had been raised that morning at a meeting of the British Empire delegation, and the point was this: The proposed treaty seemed to be perfectly clear and satisfactory as between the powers represented at this table. The difficulty was as follows: He was afraid it was very easy to conceive a case in which, for instance, one of the five powers represented around this table might be at war with another signatory power having as an ally some nation not agreeing to the treaty. An ambiguous and difficult situation would result. He would like Mr. Root's opinion upon a point which seemed, at least to some of his friends, not to be without difficulty and embarrassment. The apparent difficulty would be almost unthinkable. It would mean one of these countries represented at this table being at war with another power at the table, who had an ally not represented at the table. He did not mean to press the matter, but he was given to understand that that was a point that was in the minds of many. He did not think it had received much consideration, and as the treaty would have to run the gauntlet of many severe criticisms, like other treaties, he would like to know what Mr. Root's advice on the point was.

Mr. Root said he thought that was one of the things which it was quite impossible to provide for in the treaty. No agreement could be made in the application of which questions would not

arise in the future. If the members of the committee were to try to guard against all conceivable situations, to which this agreement between them was to be applied, they would make a treaty as long as the moral law. Now, they were making this treaty between themselves and they must assume that it would be carried out in good faith. If another power that was not bound by the treaty should come along and create a situation to which the treaty did not apply, then it would not apply; but that would have to be determined by the conditions and the facts as they arose. He could not believe that there would be any real embarrassment.

Mr. Balfour said that he would not press the matter.

Senator Schanzer stated that the Italian delegation shared the anxieties to which Mr. Balfour referred, and he thought that he had raised very opportunely the question concerning the execution of the treaty in the case of war with a power which had neither signed nor adhered to the treaty itself. If one of the five great signatory powers should find itself at war with another of the five signatory powers and the latter should be allied with a nonsignatory or nonadherent power, it was clear that the first-mentioned power could not afford to find itself bound by the duties imposed by the treaty. In effect, the nonsignatory or nonadherent power would be free to make unlimited use of submarines, poisonous gases, etc., and would do it not only in its own interest, but also in the interest of the great powers to which it was allied. He wished to repeat that, in these conditions, it was clear that the execution of the provisions of the treaty would cease to be effective. He could agree with Mr. Root that it was not absolutely indispensable to provide for this case by a special stipulation in the treaty, but it was nevertheless desirable that the interpretation given that day should be registered in the minutes of the committee. (Conference on the Limitation of Armament, p. 840.)

*Interpretation of Washington treaties of 1921–22.*—It is a general principle that treaties be interpreted in the sense in which they are made and when different words are used in the same treaty or in the same negotiation the presumption is that a different meaning is intended.

By article 119 of the treaty of Versailles, June 29, 1919, Germany renounced in favor of the principal allied and associated powers all her rights and titles over her oversea possessions.

In the treaty between the United States and Japan signed February 11, 1922, and relating to the former German islands in the Pacific there is the statement:

Considering that the benefits accruing to the United States under the aforesaid article 119 of the treaty of Versailles were confirmed by the treaty between the United States and Germany, signed on August 25, 1921, to restore friendly relations between the two nations;

Considering that the said four powers, to wit, the British Empire, France, Italy, and Japan, have agreed to confer upon His Majesty the Emperor of Japan a mandate, pursuant to the treaty of Versailles, to administer the groups of the former German islands in the Pacific Ocean lying north of the Equator in accordance with the following provisions: (Here follow the articles of the mandate.)

Considering that the United States did not ratify the treaty of Versailles and did not participate in the agreement respecting the aforesaid mandate;

Desiring to reach a definite understanding with regard to the rights of the two Governments and their respective nationals in the aforesaid islands, and in particular the island of Yap, have resolved to conclude a convention for that purpose and to that end have named as their plenipotentiaries: (Here follows names of plenipotentiaries.)

Who, after having communicated to each other their respective full powers, found to be in good and due form, have agreed as follows:

ARTICLE I

Subject to the provisions of the present convention, the United States consents to the administration by Japan, pursuant to the aforesaid mandate, of all the former German islands in the Pacific Ocean lying north of the Equator.

ARTICLE II

The United States and its nationals shall receive all the benefits of the engagements of Japan, defined in articles 3, 4, and 5 of the aforesaid mandate, notwithstanding the fact that the United States is not a member of the League of Nations.

It is further agreed between the high contracting parties as follows:

(1) Japan shall insure in the islands complete freedom of conscience and the free exercise of all forms of worship which

are consonant with public order and morality; American missionaries of all such religions shall be free to enter the islands and to travel and reside therein, to acquire and possess property, to erect religious buildings, and to open schools throughout the islands; it being understood, however, that Japan shall have the right to exercise such control as may be necessary for the maintenance of public order and good government and to take all measures required for such control.

(2) Vested American property rights in the mandated islands shall be respected and in no way impaired.

(3) Existing treaties between the United States and Japan shall be applicable to the mandated islands.

(4) Japan will address to the United States a duplicate of the annual report on the administration of the mandate to be made by Japan to the Council of the League of Nations.

(5) Nothing contained in the present convention shall be affected by any modification which may be made in the terms of the mandate as recited in the convention, unless such modification shall have been expressly assented to by the United States. (42 U. S. Stat., pt. 2, p. 2149.)

By Article II (3) "existing treaties between the United States and Japan shall be applicable to the mandated islands." Ratifications of this treaty were exchanged July 13, 1922, and the treaty was proclaimed the same day. The ratifications of the treaty on limitation of naval armament were deposited August 17, 1923, and this treaty was proclaimed August 21, 1923, but the effect of Article XIX in regard to the maintenance of the status quo was by the terms of the article to be effective from the signing not from the ratification and proclamation of the treaty.

While the treaties were not for various reasons ratified at the same time, it was not because they were unrelated. The American delegation in submitting the treaties for ratification said:

To estimate correctly the character and value of these several treaties, resolutions, and formal declarations they should be considered as a whole. Each one contributes its part in combination with the others toward the establishment of conditions in which peaceful security will take the place of competitive preparation for war.

The declared object was, in its naval aspect, to stop the race of competitive building of warships which was in process and which was so distressingly like the competition that immediately preceded the war of 1914. Competitive armament, however, is the result of a state of mind in which a national expectation of attack by some other country causes preparation to meet the attack. To stop competition it is necessary to deal with the state of mind from which it results. A belief in the pacific intentions of other powers must be substituted for suspicion and apprehension.

The negotiations which led to the four-power treaty were the process of attaining that new state of mind, and the four-power treaty itself was the expression of that new state of mind. It terminated the Anglo-Japanese alliance and substituted friendly conference in place of war as the first reaction from any controversies which might arise in the region of the Pacific; it would not have been possible except as part of a plan including a limitation and a reduction of naval armaments, but that limitation and reduction would not have been possible without the new relations established by the four-power treaty or something equivalent to it. (Conference on the Limitation of Armament, Senate Doc. No. 126, 67th Cong., 2d sess., p. 865.)

*Military organization in mandates.*—A report upon military organization in mandates was made to the permanent mandates commission at its ninth session in 1926 by M. Freire d'Andrade, of which the conclusions were as follows:

I. The mandatory can not establish any naval or military base or erect any fortifications in the mandated territory.

II. The mandatory may not train or organize any native forces except such as are necessary for police purposes and for the local defence of the territory.

III. It is the duty of the permanent mandates commission to consider the conditions of military training and organization introduced by the mandatory and, if it considers such training or organization inadequate or excessive, to inform the council.

IV. The mandatory has the right to employ the native military forces thus organized for the purpose of defending the mandated territory at a distance in the case of B mandates, but it can not do so in the case of C mandates. (Minutes, Permanent Mandates Commission, ninth session, C. 405, M. 144, 1926, VI, p. 194.)

The discussion of this report showed in the commission some differences of opinion and an unwillingness to com-

mit in advance the commission to any interpretation, but to await a case which might involve the question. (Ibid, pp. 130–134.)

*Insular possessions in the Pacific.*—The United States, the British Empire, France, and Japan at the Washington conference, December 13, 1921, reached an agreement as to their insular possessions in the Pacific, which was embodied in a treaty, which states:

I. The high contracting parties agree as between themselves to respect their rights in relation to their insular possessions and insular dominions in the region of the Pacific Ocean.

If there should develop between any of the high contracting parties a controversy arising out of any Pacific question and involving their said rights which is not satisfactorily settled by diplomacy and is likely to affect the harmonious accord now happily subsisting between them, they shall invite the other high contracting parties to a joint conference, to which the whole subject will be referred for consideration and adjustment.

II. If the said rights are threatened by the aggressive action of any other power, the high contracting parties shall communicate with one another fully and frankly in order to arrive at an understanding as to the most efficient measures to be taken, jointly or separately, to meet the exigencies of the particular situation. (43–2 U. S. Stat., pt. 2, pp. 1646, 1648.)

In signing this treaty it was declared to be the understanding and intent—

1. That the treaty shall apply to the mandated islands in the Pacific Ocean: *Provided, however,* That the making of the treaty shall not be deemed to be an assent on the part of the United States of America to the mandates and shall not preclude agreements between the United States of America and the mandatory powers, respectively, in relation to the mandated islands.

2. That the controversies to which the second paragraph of Article I refers shall not be taken to embrace questions which according to principles of international law lie exclusively within the domestic jurisdiction of the respective powers. (Ibid. 1650.)

*Insular possessions and insular dominions.*—By the treaty signed by the United States, the British Empire, France, and Japan, on February 6, 1922, the same day upon which the treaty limiting naval armament was

signed, a definition of "insular possessions and insular dominions" was given:

> The term "insular possessions and insular dominions" used in the aforesaid treaty shall, in its application to Japan, include only Karafuto (or the southern portion of the island of Sakhalin), Formosa, and the Pescadores, and the islands under the mandate of Japan.

While this treaty was supplementary to the 4-power treaty of December 13, 1921, it may be presumed that these words used in other treaties negotiated at the Washington conference by the same powers had the similar meaning. In Article XIX of the treaty limiting naval armament the words used were "insular territories and possessions" instead of "insular possessions and insular dominions," and these are enumerated:

> (3) The following insular territories and possessions of Japan in the Pacific Ocean, to wit, the Kurile Islands, the Bonin Islands, Amami-Oshima, the Loochoo Islands, Formosa, and the Pescadores, and any insular territories or possessions in the Pacific Ocean which Japan may hereafter acquire.

The enumeration above is specific with the addition of subsequent acquisitions. The enumeration in the 4-power treaty is also specific with the addition of "the islands under the mandate of Japan." It would seem to be clear, therefore, that the islands under mandatory of Japan are not necessarily included under Article XIX of the limitation of naval armament treaty.

*Insular territories, possessions, dominions.*—In Article XIX of the treaty limiting naval armament the term "insular possessions" is used in regard to the area within which the American and British Governments respectively agree to maintain the status quo. The term "insular territories and possessions" is used specifically in regard to the Japanese areas in the same treaty. The article also mentions Australia "and its territories," but in the four-power treaty of February 6, 1922, the term "insular possessions" seems to be applied as in the limitation of armament treaty to Formosa and the

Pescadores, while "insular dominions" applies to "islands under the mandate of Japan."

*Kellogg-Briand pact, 1928.*—While the preamble of the treaty for the renunciation of war signed with much formality at Paris, August 27, 1928, is not contractual, it does state the object of the treaty. It is as follows:

> Deeply sensible of their solemn duty to promote the welfare of mankind;
>
> Persuaded that the time has come when a frank renunciation of war as an instrument of national policy should be made to the end that the peaceful and friendly relations now existing between their peoples may be perpetuated;
>
> Convinced that all changes in their relations with one another should be sought only by pacific means and be the result of a peaceful and orderly process, and that any signatory power which shall hereafter seek to promote its national interests by resort to war should be denied the benefits furnished by this treaty;
>
> Hopeful that, encouraged by their example, all the other nations of the world will join in this humane endeavor and by adhering to the present treaty as soon as it comes into force bring their peoples within the scope of its beneficent provisions, thus uniting the civilized nations of the world in a common renunciation of war as an instrument of their national policy;

In transmitting the treaty the United States had indicated that it did not impair (1) the right of self-defense, (2) the league covenant, (3) the Locarno pact, (4) neutralization treaties; that it implied (5) termination of relations with treaty-breaking states, (6) general acceptance. In the reply of the French Government it was said of the interpretations given by the Government of the United States:

> These interpretations may be resuméd as follows:
>
> Nothing in the new treaty restrains or compromises in any manner whatsoever the right of self-defense. Each nation in this respect will always remain free to defend its territory against attack or invasion; it alone is competent to decide whether circumstances require recourse to war in self-defense.
>
> Secondly, none of the provisions of the new treaty is in opposition to the provisions of the covenant of the League of Nations nor with those of the Locarno treaties or the treaties of neutrality.

Moreover, any violation of the new treaty by one of the contracting parties would automatically release the other contracting powers from their obligations to the treaty-breaking state.

Finally, the signature which the Government of the United States has now offered to all the signatory powers of the treaties concluded at Locarno and which it is disposed to offer to all powers parties to treaties of neutrality as well as the adherence made possible to other powers is of a nature to give the new treaty, in as full measure as can practically be desired, the character of generality which accords with the views of the Government of the Republic.

The contractual articles of the treaty are as follows:

ARTICLE 1. The high contracting parties solemnly declare in the names of their respective peoples that they condemn recourse to war for the solution of international controversies, and renounce it as an instrument of national policy in their relations with one another.

ART. 2. The high contracting parties agree that the settlement or solution of all disputes or conflicts of whatever nature or of whatever origin they may be which may arise among them shall never be sought except by pacific means.

ART. 3. The present treaty shall be ratified by the high contracting parties named in the preamble in accordance with their respective constitutional requirements and shall take effect as between them as soon as all their several instruments of ratification shall have been deposited at Washington.

In discussing self-defense the Government of the United States said in the note of June 23, 1928:

There is nothing in the American draft of an antiwar treaty which restricts or impairs in any way the right of self-defense. That right is inherent in every sovereign state and is implicit in every treaty. Every nation is free at all times and regardless of treaty provisions to defend its territory from attack or invasion, and it alone is competent to decide whether circumstances require recourse to war in self-defense. If it has a good case the world will applaud and not condemn its action. Express recognition by treaty of this inalienable right, however, gives rise to the same difficulty encountered in any effort to define aggression. It is the identical question approached from the other side. Inasmuch as no treaty provision can add to the natural right of self-defense, it is not in the interest of peace that a treaty should stipulate a juristic conception of self-defense, since it is far too easy for the unscrupulous to mold events to accord with an agreed definition.

The treaty was considered at different times in the Senate of the United States, which on January 15, 1929, advised and consented to the ratification of the treaty. In submitting the treaty to the Senate the Committee on Foreign Relations said:

> The treaty in brief pledges the nations bound by the same not to resort to war in the settlement of their international controversies save in bona fide self-defense and never to seek settlement of such controversies except through pacific means. It is hoped and believed that the treaty will serve to bring about a sincere effort upon the part of the nations to put aside war and to employ peaceful methods in their dealing with each other.
>
> The committee reports the above treaty with the understanding that the right of self-defense is in no way curtailed or impaired by the terms or conditions of the treaty. Each nation is free at all times and regardless of the treaty provisions to defend itself, and is the sole judge of what constitutes the right of self-defense and the necessity and extent of the same. (70 Cong. Record, p. 1730.)

## CONCLUSION

No exact interpretation of agreements relating to islands in the Pacific Ocean and entered into since 1917 has been made. The introduction of the system of mandates under article 22 of the covenant of the League of Nations, 1919, the restrictions of fortifications by article 19 of the treaty limiting naval armament, 1922, and the other agreements, and the declaration of the Washington conference, 1922, as well as the Kellogg-Briand pact of 1928, have, however, greatly modified the status of the islands in the Pacific Ocean as areas of possible belligerent action.

9855—31——8

## Situation III

## NEUTRAL OBLIGATIONS

States X and Y are at war. Other states are neutral.

(*a*) State D in its proclamation of neutrality forbids entrance to its waters to all belligerent vessels except strictly private merchant vessels upon the surface.

(1) The *West Wind*, a passenger vessel belonging to a citizen of state X, having on board among its passengers 100 soldiers on its regular voyage along the coast passes within 3 miles of D and is there seized by a vessel of war of D and the vessel and soldiers are interned.

(2) The *Porpoise*, a submarine belonging to state Y, but engaged in merchant service, is caught in a net 1 mile offshore of D and enters a port of D in distress. The port authorities intern the submarine.

(3) The *East Wind*, a merchant vessel belonging to a private citizen of Y, is captured by a cruiser of X and a prize crew is put on board. The radio upon the *East Wind* becomes disabled and the vessel enters a port of D. The authorities of D intern the prize crew, allow the repairs, and release the *East Wind*.

(*b*) State E has merely declared that it would maintain its neutrality.

(1) The *Athens*, a merchant vessel owned by a citizen of state F, sails from a port of E, having cleared for its home port. En route and on the high seas the *Athens* meets war vessels of X and sells to these vessels the fuel and provisions which it has on board. The *Athens* then returns to state E and takes on board fuel and provisions to replace those sold.

(2) The *King*, one of the vessels of war of Y, enters a port of E and the commanding officer goes ashore and sends to and receives from the fleet outside through the regular radio station messages in regard to the war.

(3) The second day afterwards the *Prince*, another vessel from the fleet, enters the same port and its commanding officer sends and receives similar messages as well as ordinary cable messages.

States X and Y, when adversely affected, protest that their rights under the laws of neutrality have not been respected. Are the protests well grounded? Why?

SOLUTION

(*a*) (1) The protest of state X against the action of state D both as regards the removal of the soldiers and the internment of the *West Wind* is valid.

(2) The protest of state Y against the internment of the submarine, the *Porpoise*, is not valid.

(3) The protest of state X against the action of state D in interning the prize crew on the *East Wind* and allowing repairs and release of the vessel is not valid.

(*b*) (1) The protest of state Y against the furnishing of fuel and provisions within a period of three months in state E to the*Athens* is valid.

(2) The protest of state X against the toleration by state E of such use of radio by the commanding officer of the *King* is valid.

(3) The protest of state X against the toleration by state E of such use of the radio by the commanding officer of the *Prince* is valid.

The protest against the use of the submarine cable is not valid, though censorship may be requested.

NOTES

*Proclamations of neutrality, 1914–1918.*—During the World War, 1914–1918, the nature of the proclamations of neutrality varied greatly. Some were brief and gen-

eral in their terms; others were of great length and detailed in their specifications, and sometimes explanatory notes followed these specifications. Special proclamations were issued from time to time as new conditions seemed to demand.

The declaration issued by Spain, August 7, 1914, was brief, announcing the fact that certain states were at war and prescribing for "Spanish subjects the strictest neutrality in conformity with the laws in force and the principles of public international law," and putting into operation certain parts of the Spanish penal code. Other decrees later made operative certain Hague conventions, etc.

The Netherlands declaration of neutrality of August 5, 1914, contained 18 articles. The eighteenth article called attention to the articles of codes and to legislation. The Netherlands, being surrounded by belligerents, necessarily found the problem of maintenance of neutrality difficult, and explicit provisions were essential.

Even on the coasts of the Americas the problems of maintaining neutral rights became so acute that suggestions were made that there be concerted action by the neutral American states. (Memorandum, Peruvian Minister for Foreign Affairs, November, 1914; 1914 For. Rel. Sup. p. 442.) It was suggested that a congress of neutrals be summoned.

*Netherlands declaration, 1914.*—The Netherlands declaration of neutrality of August 5, 1914, is owing to the geographical situation, naturally strict and definite. The right of the Netherlands to enforce regulations so strict in nature was questioned by belligerents, but the Netherlands Government remained firm. The declaration provided:

ARTICLE 1. Within the limits of the territory of the State, including the territory of the Kingdom in Europe and the colonies and possessions in other parts of the world, no hostilities of any kind are permitted, neither may this territory serve as a base for hostile operations.

ART. 2. Neither the occupation of any part of the territory of the state by a belligerent nor the passage across this territory by land is permitted to the troops or convoys of munitions belonging to the belligerents, nor is the passage across the territory situated within the territorial waters of the Netherlands by the warships or ships assimilated thereto of the belligerents permitted.

ART. 3. Troops or soldiers belonging to the belligerents or destined for them arriving in the territory of the state by land will be immediately disarmed and interned until the termination of the war.

Warships or ships assimilated thereto belonging to a belligerent who contravenes the provisions of articles 2, 4, or 7 will not be permitted to leave the said territory until the end of the war.

ART. 4. No warships or ships assimilated thereto belonging to any of the belligerents shall have access to the said territory.

ART. 5. The provisions of article 4 do not apply to—

1. Warships or ships assimilated thereto which are forced to enter the ports or roadsteads of the state on account of damages or the state of the sea. Such ships may leave the said ports or roadsteads as soon as the circumstances which have driven them to take shelter there shall have ceased to exist.

2. Warships or ships assimilated thereto belonging to a belligerent which anchor in a port or roadstead in the colonies or oversea possessions exclusively with the object of completing their provision of foodstuffs or fuel. These ships must leave as soon as the circumstances which have forced them to anchor shall have ceased to exist, subject to the condition that their stay in the roadstead or port shall not exceed 24 hours.

3. Warships or ships assimilated thereto belonging to a belligerent employed exclusively on a religious, scientific, or humanitarian mission. * * *

ART. 17. The state territory comprises the coastal waters to a distance of 3 nautical miles, reckoning 60 to the degree of latitude, from low-water mark.

As regards inlets, this distance of 3 nautical miles is measured from a straight line drawn across the inlet at the point nearest the entrance where the mouth of the inlet is not wider than 10 nautical miles, reckoning 60 to the degree of latitude. (1916 N. W. C., Int. Law Topics, p. 61.)

### (*a*) (*1*) *Transport of forces.*

*Transit of reservists.*—Neutral obligations in regard to the carriage of persons who might serve or probably would serve in the armed forces of a belligerent have long been matters of discussion. As early as August 8, 1914,

the French chargé d'affaires in a communication to the Secretary of State said:

I hear that the collector of customs at New York has sent to our consul general a communication according to which "all that could be utilized for the army, either men or supplies," will be considered as contraband.

If in accord with a decision of the Federal Government, that communication seems to me to call for the most express reservations:

1. The law of nations can not stand in the way of the citizens of a country at war discharging their most sacred duty. Besides, at the time of the Balkan wars, large numbers of reservists returned to their country by groups without any objection being raised. (1914, For. Rel., Sup., p. 557.)

The Secretary of State replied that there must be a mistake, as the Federal Government had made no such decision, and, further, it was said:

Replying, I beg to say that this situation must have resulted from mistake somewhere, or must have been the result of extra precautions at the beginning of European hostilities to prevent the outfitting of ships for use in war or military expeditions or enterprises from the United States in violation of her neutrality. I hardly think that the collector of customs was acting under instructions, if he made such a declaration as that attributed to him. That declaration is not the decision of the Federal Government, which is neither interested nor inclined in having supplies considered contraband of war on the ground that they could be utilized for the army or military forces of the belligerents. On the contrary, it is and has been the hope of this department that the Governments unhappily at war in Europe will make liberal declarations respecting contraband, to the end that international commerce may suffer the least possible hardships during the existence of hostilities. This department has advised the trade in this country that cereals, and foodstuffs generally, will constitute contraband of war only when destined to the army or navy or some department of government of one of the belligerents. This Government will not, of course, seek to unnecessarily restrict the commerce of its citizens with those of the nations at war, or to extend contraband so as to include foodstuffs or supplies, merely on the ground that they are adaptable to the uses of war.

I hand you herewith instructions to the collectors of customs, issued by the Secretary of the Treasury on August 8 [10], 1914, and call your attention to their provisions, which, as you will ob-

serve, are not in accord with the communication which the consul general says he has received from the collector of customs at New York.

Replying to the other grounds of your exceptions, no resistance, within the knowledge of this department, has been offered to reservists in the army of any of the belligerents wishing to leave this country for military service in their native lands, whether such reservists leave singly or in numbers. It is believed that the only restriction upon the departure of citizens of any of the countries of war for service in the army is to be found in the neutrality laws of the United States, embodied in the proclamation of the President, prohibiting the "beginning or setting on foot or providing or preparing the means for any military expedition or enterprise to be carried on from the territory or jurisdiction of the United States against the territories or dominions of either of the said belligerents." What constitutes a military expedition or enterprise either begun or set on foot in this country has been the subject of some judicial determination by the courts of the United States; and, while it is not deemed necessary to point to these decisions at this time, it may be said generally that return from the United States to their native lands by citizens of foreign countries, though to enter military service there, whether their departure is singly or in numbers, is not illegal or in violation of the neutrality of the United States, unless accompanied by other circumstances evidencing the beginning or setting on foot, or providing or preparing the means for a military expedition or enterprise from the territory or jurisdiction of the United States against the territories or dominions of one of the belligerents. It is the purpose of this Government to observe complete neutrality in the war now being waged by European countries; but it is not deemed necessary to adopt means or to apply regulations which are not demanded by the neutrality laws of the United States or the rules of international law. (Ibid., p. 558.)

In subsequent correspondence questions were raised in regard to the carriage on neutral vessels either as crew or passengers of persons liable to military service in a belligerent country. The United States made it clear that the right to arrest such persons on the high seas unless they were already enrolled in the forces of a belligerent would not be admitted. The fitting out or setting on foot of a military expedition in the United States was prohibited.

The question as to whether reservists might be permitted to pass through the United States was raised early in the World War. In a telegram of the Secretary of State to the consul general at Vancouver, August 13, 1914, it was explained that—

> Neither the neutrality laws of the United States nor proclamation of the President prohibit passage through the United States of reservists who are returning to their respective countries for the purpose of military service, when the circumstances of their transit do not amount to the beginning or setting on foot or providing or preparing the means for any military expedition or enterprise to be carried on from the territory or jurisdiction of the United States. If such reservists are organized and armed and so manifest the existence of a military expedition or enterprise, they are not entitled to transit through the United States. (1914 For. Rel. U. S. Sup., p. 564.)

Information to similar intent was given to the diplomatic representatives of the belligerent powers and later it was also stated that the governments availing themselves of this permission should preserve the United States against such reservists or others becoming a public charge.

*Innocent passage.*—Of innocent passage in general the report of the Research in International Law, Harvard Law School, proposed the following:

ARTICLE 14

> A state must permit innocent passage through its marginal seas by the vessels of other states, but it may prescribe reasonable regulations for such passage.

In supporting this article the report said:

> Notwithstanding the fact that the sovereignty of a state extends over its marginal sea, the state may not prevent the innocent passage of vessels of other states through such waters, free of all tolls, light dues, or other exactions. This recognition of the right of innocent passage is the result of an attempt to reconcile the existence of sovereignty over marginal seas with the freedom of navigation on the high seas. In inland waters the right of innocent passage is not recognized.
>
> It seems necessary to include in the convention a definition of "innocent passage." It should, perhaps, be observed that inno-

cent passage is not necessarily restricted to voyages between destinations outside the littoral state, although the vessel of another state is not in innocent passage when she is approaching the port of a state through its marginal seas or when she is entering or leaving a port of that state. For example, a British vessel leaving New York for Galveston may be in innocent passage when traversing the marginal sea off the Florida coast, but would not be in innocent passage when traversing the marginal sea upon leaving New York and approaching Galveston.

The word "vessels" in article 14 is limited by the definition in article 22, thus confining innocent passage to vessels which are privately owned and privately operated and to vessels the legal status of which is assimilated to that of such vessels. This excludes vessels of war from exercising the right of innocent passage. The sovereignty of the littoral state is restricted by the right of innocent passage because of a recognition of the freedom of the seas for the commerce of all states. There is, therefore, no reason for freedom of innocent passage of vessels of war. Furthermore, the passage of vessels of war near the shores of foreign states and the presence without prior notice of vessels of war in marginal seas might give rise to misunderstanding even when they are in transit. Such considerations seem to be the basis for the common practice of states in requesting permission for the entrance of their vessels of war into the ports of other states. A state may permit the passage of the war vessels of other states through its marginal sea, but the text relieves it from any obligatiion to do so. It might properly be assumed that a state does permit such passage when no action has been taken by that state regulating it. Even for vessels entitled to exercise the right of innocent passage it is obviously necessary that each state should be permitted to make reasonable regulations governing that passage, subject only to the restriction that these regulations be uniform for all states. Such regulations may, of course, distinguish between different kinds of vessels. For example, a littoral state might require all submarine vessels of other states to navigate upon the surface in order that shipping in the marginal sea may not be subjected to unknown risks. (23 A. J. I. L. Spec. Sup., [April, 1929], p. 295.)

SOLUTION

(*a*) (1) The protest of state X against the action of state D both as regards the removal of the soldiers and the internment of the *West Wind* is valid.

(*a*) (2) *Entrance of vessels.*

*Public-owned merchant vessel.*—The status of public-owned vessels engaged in trade or merchant service has been differently regarded in courts of different states and sometimes in the different courts of the same state. A claim was made against the steamship *Pesaro* in 1926 for failure to deliver certain cargo accepted for transportation from Italy to New York. There was no denial that the ship was operated as a merchant vessel for the carriage of merchandise.

The *Pesaro* was libeled for failure to deliver this cargo and the district court dismissed the libel and the case was appealed to the Supreme Court of the United States.

The Italian ambassador to the United States appeared and on behalf of the Italian Government specially set forth that the vessel at the time of her arrest was owned and possessed by that Government, was operated by it in its service and interest; and therefore was immune from process of the courts of the United States. At the hearing it was stipulated that the vessel when arrested was owned, possessed, and controlled by the Italian Government, was not connected with its naval or military forces, was employed in the carriage of merchandise for hire between Italian ports and ports in other countries, including the port of New York, and was so employed in the service and interest of the whole Italian nation as distinguished from any individual member thereof, private or official, and that the Italian Government never had consented that the vessel be seized or proceeded against by judicial process. On the facts so appearing the court sustained the plea of immunity and on that ground entered a decree dismissing the libel for want of jurisdiction. (Berizzi Brothers Co. *v.* S. S. Pesaro, 271 U. S. [1926] 562.)

It is realized that the practice of operating publicly owned vessels in the merchant marine will give rise to new and delicate problems, and there may be disadvantages which may appear later to offset the advantages which have been expected. The government engaging in such undertakings at first appears to be in an advantageous position over private owners.

The recent extension of governmental functions particularly in relation to business have given rise to diffi-

culties and have made early precedents which might be technically applicable open to question from a practical or business point of view. Some of these questions arose in the case of the *Porto Alexandre* decided in the British court in 1920. The *Porto Alexandre* had run upon the mud in the River Mersey. When arrested for payment of salvage the Portuguese Republic put forward the claim that the *Porto Alexandre* was a public vessel and an appeal was granted from the decision of Mr. Justice Hill which set aside the writ in rem and all subsequent proceedings against the vessel. Lord Justice Scrutton said, supporting the earlier decision:

> I quite appreciate the difficulty and doubt which Hill, J., felt in this case, because no one can shut his eyes, now that the fashion of nationalization is in the air, to the fact that many states are trading or are about to trade with ships belonging to themselves; and if these national ships wander about without liabilities, many trading affairs will become difficult. But it seems to me the remedy is not in these courts. The *Parlement Belge* excludes remedies in these courts. But there are practical commercial remedies. If ships of the state find themselves left on the mud because no one will salve them when the state refuses any legal remedy for salvage, their owners will be apt to change their views. If the owners of cargoes on national ships find that the ship runs away and leaves them to bear all the expenses of salvage, as has been done in this case, there may be found a difficulty in getting cargoes for national ships. These are matters to be dealt with by negotiations between governments and not by governments exercising their power to interfere with the property of other states contrary to the principles of international courtesy which govern the relations between independent and sovereign states. While appreciating the difficulties which Hill, J., has felt, I think it is clear that we must in this court stand by the decision already given, and the appeal must be dismissed. (N. W. C., Int. Law Decisions, 1923, p. 59.)

*Public vessels and commerce.*—In the case of Berizzi Bros. Co. *v.* the Pesaro, already referred to, admitting that the precise question presented had never been before the court, the Supreme Court of the United States relied largely upon the opinion of Chief Justice Marshall in the case of the schooner Exchange *v.* McFaddon (7 Cranch

[1812], p. 116). The *Exchange* was an armed vessel under the French flag to which McFaddon and another claimed ownership.

Chief Justice Marshall said "this case involves the very delicate and important inquiry whether an American citizen can assert in an American court a title to an armed national vessel found within the waters of the United States."

In the case of the *Pesaro* it was stated that "the single question presented for decision by us is whether a ship owned and possessed by a foreign government, and operated by it in the carriage of merchandise for hire, is immune from arrest under process based on a libel in rem by a private suitor in a Federal district court exercising admiralty jurisdiction. (271 U. S. [1926] 562.)

In the case of the *Pesaro* it was said:

> It will be perceived that the opinion, although dealing comprehensively with the general subject, contains no reference to merchant ships owned and operated by a government. But the omission is not of special significance, for in 1812, when the decision was given, merchant ships were operated only by private owners, and there was little thought of governments engaging in such operations. That came much later.
>
> The decision in the *Exchange* therefore can not be taken as excluding merchant ships held and used by a government from the principles there announced. On the contrary, if such ships come within those principles, they must be held to have the same immunity as war ships, in the absence of a treaty or statute of the United States evincing a different purpose. No such treaty or statute has been brought to our attention.
>
> We think the principles are applicable alike to all ships held and used by a government for a public purpose, and that when, for the purpose of advancing the trade of its people or providing revenue for its treasury, a government acquires, mans, and operates ships in the carrying trade, they are public ships in the same sense that warships are. We know of no international usage which regards the maintenance and advancement of the economic welfare of a people in time of peace as any less a public purpose than the maintenance and training of a naval force.
>
> The subsequent course of decision in other courts gives strong support to our conclusion. (Ibid.)

There were cited the cases of Briggs *v.* Light Boats (11 Allen, Mass. 157), vessels used as floating lights to aid navigation, the *Parlement Belge* (L. R. 5, P. D. 197), a vessel owned by Belgium and used for transporting mail, passengers, and freight for hire, and other cases.

The lower court, by Judge Mack, had decided that the principle of immunity did not extend to vessels employed as merchant vessels. (277 Fed. Rep. 473.)

*The "Lake Monroe."*—The *Lake Monroe* was a Government-owned vessel chartered to a shipping company and was carrying freight when it collided with an American fishing schooner. Whether the *Lake Monroe* should be exempt from arrest was among the questions raised before the court. In the act of September 7, 1916, it had been provided, section 9—

> Such vessels while employed solely as merchant vessels shall be subject to all laws, regulations, and liabilities governing merchant vessels, whether the United States be interested therein as owner, in whole or in part, or hold any mortgage, lien, or other interest therein. (39 U. S. Stat., Pt. 1., pp. 728, 730.)

In regard to this it was the opinion of the Supreme Court that—

> The language of section 9, "such vessels while employed solely as merchant vessels," must be read in connection with the phrase "whether the United States be interested therein as owner, in whole or in part, or hold any mortgage, lien, or other interest therein." Her service at the time was purely commercial, and she was subject by the terms of the act to the ordinary liability of a merchant vessel, notwithstanding the indirect interest of the Government in the outcome of her voyage.
>
> We deem it clear, also, that among the liabilities designated by the section is the liability of a merchant vessel to be subjected to judicial process in admiralty for the consequences of a collision. (The *Lake Monroe*, 250 U. S. [1919], 246.)

*The "Comte de Smet de Naeyer."*—The full-rigged ship *Comte de Smet de Naeyer* was owned by a Belgian company and was used as a school ship. When captured by German forces and brought before the prize court at Hamburg the court decided in favor of the owners for

the release of the ship partly on the ground that its mission was scientific. The German Government appealed. The higher court said:

> As has been explained in detail in the decision of the competent court of October 6, 1916, in the matter of the *Primavera*, the prize regulations in agreement with the London declaration are to be understood to mean by the expression "Merchant ships" any ocean-going ship that is not the property of the State. If this results distinctly from article 2 of the prize court regulations according to which only neutral public ships are excepted from the exercise of the prize law, it is also explicitly stated in the London conference that the expression "navire de commerce" includes all ships that are not public ships, and, accordingly, in article 6 of the prize regulations, it was regarded as necessary by way of exception to exempt certain ships from seizure that are not built to enter ocean service for gain, and, therefore, would not be regarded as merchant ships in the narrower sense. (1922 N. W. C. Int. Law Documents, p. 151.)

The decision of the lower court was set aside and the ship condemned.

*Decisions as to vessels.*—A review of recent cases upon the status of merchant vessels belonging to or controlled by states shows a wide variety of opinion which is admittedly very unsatisfactory. Manifestly a merchant vessel owned by a state might be at a marked advantage over a privately owned merchant vessel if it possessed the immunities to which a vessel of war is entitled. Foreign port authorities would be embarrassed in differentiating in the treatment of publicly owned and privately owned merchant vessels.

There may be further difficulties arising in consequence of the nature and probable disposition of cargo. If both ship and cargo are devoted solely to public service, as in furnishing supplies to lighthouses, the immunity may be of a different degree from that of a ship and cargo engaged in a purely commercial venture.

*League of Nations committee, 1926.*—The Committee of Experts for the Progressive Codification of International Law in 1926 appointed a subcommittee "to inquire into

the legal status of Government ships employed in commerce with a view to the solution by way of conventions of the problems raised thereby." (20 A. J. I. L., Spec. Sup., p. 260.) The subcommittee reported that regulations by international agreement were "desirable and realizable." The subject had been before the unofficial international maritime committee for several years and a draft convention was signed by several states April 10, 1926, but this is subject to ratification. In the discussions before the international maritime committee it was evident that the determination of the status of vessels publicly owned or publicly controlled in whole or in part was not merely of importance in time of war but also in time of peace. It was admitted as a matter of course that a state could determine the status of vessels which itself owned or controlled while such vessels were within its own jurisdiction, but the application of the same regulations to vessels publicly owned or controlled flying a foreign flag and entering its jurisdiction was doubted and the opinions were not uniform.

In early opinion the status of publicly owned or controlled merchant vessels with little difference of view was assimilated to that of public vessels employed in state service. Gradually this easy solution of the problem was questioned in diplomatic correspondence and in courts. The courts sometimes admitted that while following precedents in reaching a decision that there was ground in new conditions for modifying the immunities if publicly owned vessels were to be used as merchant vessels. As the question has received further consideration, the need of new rules has become more evident.

The subcommittee, consisting of Mr. de Magalhaes and Mr. Brierly, appointed by the League of Nations committee of experts, gave the opinion that "the legal status of Government vessels employed in commercial work is a problem which it is most desirable, and quite possible, to solve by international agreement." The subcommittee

would extend such agreements to the cargoes and passengers on these vessels.

The International Maritime Committee at Gothenburg in 1923 adopted the following resolution on the "immunity of state-owned ships":

ARTICLE 1. Vessels owned or operated by states, cargoes owned or operated by states, cargoes owned by them, and cargo and passengers carried on such vessels and the states owning or operating such vessels shall be subjected, in respect of claims relating to the operation of such vessels or to such cargoes, to the rules of liability and to the same obligations as those applicable to private vessels, persons or cargoes.

ART. 2. Except in the case of the ships and cargoes mentioned in paragraph 3, such rules and liabilities shall be enforceable by the tribunals having jurisdiction over, and by the procedure applicable to, a privately owned vessel or cargo or the owner thereof.

ART. 3. In the case of (*a*) ships of war and other vessels owned or operated by the state and employed only in governmental noncommercial work; (*b*) state-owned cargo carried only for purpose of governmental noncommercial work on vessels owned or operated by the state, such liabilities shall be enforceable only by action before the competent tribunals of the state owning or operating the vessel in respect of which the claim arises.

ART. 4. The provisions of this convention will be applied in every contracting state in all cases where the claimant is a citizen of one of the contracting states, provided always that nothing in this convention shall prevent any of the contracting states from settling by its own laws the rights allowed to its own citizens before its own courts. (20 A. J. I. L. [1926] Spec. Sup., p. 276.)

The subcommittee proposed certain changes in this resolution:

(*a*) In article 1 suppress the words "in respect of claims relating to the operation of such vessels or to such cargoes" and insert them in article 2 after the words "such rules and liabilities."

(*b*) In article 3, paragraph (*a*), substitute the word "public" for the word "governmental," and in paragraph (*b*) of the same article for the word "governmental" read "public."

(*c*) Article 4 should be drafted as follows:

"The provisions of the conventions of 1910 and 1922 are amended in so far as they except all state ships."

Article 4 of the draft becomes article 3.

(*d*) Add a new article, numbered 6, to read as follows:

"In time of war, ships belonging to a belligerent state or managed by it, and cargoes belonging to such a state or borne on such ships, shall not be liable to attachment, seizure, or detention by a foreign court of justice.

"Actions against such ships or cargoes may, during the war, be brought before the competent court of the state owning or managing such ships or cargoes."

(*e*) Add further new article numbered 7, to read as follows:

"The high contracting parties undertake that, should different interpretations of the provisions of this convention be adopted in various countries, they will request the Council of the League of Nations to obtain the opinion of the Permanent Court of International Justice at The Hague upon the said divergences of interpretation." (Ibid., p. 277.)

*Treatment of vessels.*—In the United States the words "vessel of the United States" are used to mean any vessel publicly or privately owned under the flag of the United States.

By the suits in admiralty, act of 1920 (41 U. S. Stat., p. 525), publicly owned vessels are not subject to seizure or arrest by judicial process though, if engaged as a merchant vessel, a libel in personam may be brought within the United States. If a suit is brought in a foreign state against a merchant vessel owned by the United States the consul in the district may claim that the vessel is immune from arrest and may execute an agreement, give bond or otherwise arrange for the release of the vessel pledging the United States to satisfy judgment.

The convention and statute on the international régime of maritime ports, which came into force July 20, 1926, provides in article 13 that "This statute applies to all vessels, whether publicly or privately owned or controlled." It does not apply, however, to vessels exercising public authority as "warships or vessels performing police or administrative functions."

*Entrance of submarines.*—The use of submarines while foreseen did not become a problem of serious importance

till the World War. During the World War the allied powers were particularly desirous of limiting the activities of submarines within the narrowest possible range. The Governments of Italy, August 21, 1916; France, August 21; Great Britain, August 22; Russia, August 26; Japan, August 28; Portugal, August 30, transmitted an identic memorandum to neutral powers as follows:

In the presence of the development of submarine navigation, under existing circumstances and by reason of what may unfortunately be expected from enemy submarines, the allied Governments deem it necessary, in order to protect their belligerent rights and the freedom of commercial navigation, as well as to remove chances of conflict, to exhort the neutral Governments, if they have not already done so, to take efficacious measures tending to prevent belligerent submarines, regardless of their use, to avail themselves of neutral waters, roadsteads, and harbors.

In the case of submarines the application of the principles of international law offers features that are as peculiar as they are novel, by reason, on the one hand, of the facility possessed by such craft to navigate and sojourn in the seas while submerged and thus escape any supervision or surveillance, and, on the other hand, of the impossibility to identify them and determine their national character, whether neutral or belligerent, combatant or innocent, and to put out of consideration the power to do injury that is inherent in their very nature.

It may be said, lastly, that any submarine war vessel far away from its base, having at its disposal a place where it can rest and replenish its supplies, is afforded, by mere rest obtained, so many additional facilities that the advantages it derives therefrom turn that place into a veritable basis of naval operations.

In view of the present condition of things the allied Governments hold that—

Submarine vessels must be excluded from the benefit of the rules heretofore accepted in international law regarding the admission and sojourn of war and merchant vessels in the neutral waters, roadsteads, and harbors; any submarine of the belligerents that once enters a neutral harbor must be held there.

The allied Governments take this opportunity to warn the neutral powers of the great danger to neutral submarines attending the navigation of waters visited by the submarines of belligerents. (10 A. J. I. L. Spec. Sup. 1916, p. 342.)

The United States in a memorandum after giving a résumé of its understanding of that of the allies said;

In reply the Government of the United States must express its surprise that there appears to be an endeavor of the allied powers to determine the rule of action governing what they regard as a "novel situation" in respect to the use of submarines in time of war and to enforce acceptance of that rule, at least in part, by warning neutral powers of the great danger to their submarines in waters that may be visited by belligerent submarines. In the opinion of the Government of the United States the allied powers have not set forth any circumstances, nor is the Government of the United States at present aware of any circumstances, concerning the use of war or merchant submarines which would render the existing rules of international law inapplicable to them. In view of this fact and of the notice and warning of the allied powers announced in their memoranda under acknowledgment it is incumbent upon the Government of the United States to notify the Governments of France, Great Britain, Russia, and Japan that, so far as the treatment of either war or merchant submarines in American waters is concerned, the Government of the United States reserves its liberty of action in all respects and will treat such vessels as, in its opinion, becomes the action of a power which may be said to have taken the first steps toward establishing the principles of neutrality and which for over a century has maintained those principles in the tradit onal spirit and with the high sense of impartiality in which they were conceived.

In order, however, that there should be no misunderstanding as to the attitude of the United States, the Government of the United States announces to the allied powers that it holds it to be the duty of belligerent powers to distinguish between submarines of neutral and belligerent nationality, and that responsibility for any conflict that may arise between belligerent warships and neutral submarines on account of the neglect of a belligerent to so distinguish between these classes of submarines must rest entirely upon the negligent powers. (Ibid., p. 343.)

SOLUTION

(*a*) (2) The protest of state Y against the internment of the submarine, the *Porpoise*, is not valid.

(*a*) (3) *Entrance of prize.*

*The German "UC 8," 1915.*—On November 5, 1915, the *UC 8*, a German submarine, showed signals of distress off the Dutch coast near Terschelling. A Dutch vessel

went to its assistance and the submarine was escorted to Terschelling. Two days later the submarine was notified that it would be interned as it had entered Dutch waters contrary to the declaration of neutrality and the submarine was interned at Alkmaar.

On November 11, 1915, the German minister at The Hague protested against the internment maintaining that the submarine had entered Dutch waters because of a defective electric compass, that the action of the Netherland Government was not in accord with conventional and international law, that such restrictions as were contained in the Netherlands declaration of neutrality could not be established by unilateral declaration, and that the measures of restraint were excessive.

The Netherland Government in a reply of November 22, 1915, said:

L'internement du *C 8* est basé sur les prescriptions des articles 4, 17 et 3, 2e al. de la déclaration de neutralité néerlandaise, qui fut communiquée au Gouvernement Impérial par l'intermédiaire de la Légation des Pays-Bas à Berlin. L'article 4 statue que la présence d'aucun navire de guerre belligérant ne sera permise dans la juridiction des Pays-Bas; l'article 17 porte que cette juridiction comprend la mer territoriale qui est d'une largeur de trois milles marins; l'article 3, al. 2, prescrit l'internement du navire de guerre belligérant qui serait entré dans ladite juridiction au mépris de l'art. 4. L'article 2 cité dans l'office de Votre Excellence ne déroge pas à l'interdiction de l'art. 4, il en forme au contraire une amplification en ce qu'il exclut expressément le passage par les eaux intérieures.

L'interdiction contenue dans l'article 4 n'est d'aucune façon contraire au Droit des Gens. L'article 10 de la XIIIe Convention de la Haye statue que la neutralité d'un état n'est pas compromise par le simple passage de navires de guerre belligérants dans ses eaux territoriales. Lors de l'élaboration de cet article il fut constaté que la question de savoir si un état neutre a le droit d'interdire ce passage était laissée sous l'empire du Droit des Gens général. Ce droit autorise un état neutre à prendre dans ses eaux territoriales les mesures nécessaires pour la sauvegarde de ses droits souverains. Aucun précepte ne défend à un état d'interdire à cet effet aux navires de guerre belligérants de se rendre dans ces eaux. Le droit d'un état neutre d'en interdire le pas-

sage à ces navires est reconnu par différents auteurs contemporains du Droit des Gens, entre autres tout dernièrement par le Docteur Hans Wehberg dans son ouvrage intitulé, "Das See-Kriegsrecht," où il est dit: "Den Neutralen muss vielmehr das Recht den Kriegsschiffen die Durchfahrt durch die Kuestengewaesser zu verbieten in vollem Umfange zugesprochen werden." * * *

L'article 5 de la Déclaration de neutralité énonce les cas où nonobstant la régle de l'article 4 la présence d'un navire de guerre d'un belligérant dans la juridiction des Pays-Bas est permise. Aucun de ces cas ne se présentait pour le *C 8*, notamment le navire n'avait subi aucune avarie qui nécessitait son entrée dans les eaux territoriales néerlandaises.

Un défaut du compas électrique ne saurait justifier l'entrée du sous-marin dans les eaux territoriales néerlandaises, vu que le commandant, eu égard aux difficultés de navigation dans ces parages, aurait en tout cas dû prendre les précautions de rigueur pour éviter de pénétrer dans les dites eaux, c'est-à-dire en naviguant à la sonde. Cette précaution était d'autant plus nécessaire, que le commandant d'après sa propre déclaration, avait déjà pendant le voyage douté du fonctionnement correct du compas.

Une copie de la déclaration en langue néerlandaise signée par le commandant et portant en marge une addition en langue allemande, également signée par lui, est jointe à la présente.

De ce qui précède il résulte d'une part que la déclaration de neutralité néerlandaise imposait au Gouvernement de la Reine le devoir absolu de procéder à l'internement du sous-marin *C 8*, d'autre part que les règles qu'elle contient à ce sujet ne sont nullement contraires au Droit des Gens. (Ministre des Affaires Etrangères, Recueil de diverses communications, 1916, p. 151.)

This reply was not satisfactory to the German Government, as was stated in a note of November 25 setting forth the German position and requesting the immediate release of the submarine.

The Netherlands Government later, December 7, 1915, pointed out to Germany that—

Dans son exposé le Gouvernement Impérial passe sous silence quelques points de grande importance, savoir:

1. que le commandant du sous-marin s'était aperçu déjà en pleine mer que son compas électrique ne fonctionnait pas bien;

2. que néanmoins il n'avait pas pris la précaution de rigueur dans ces parages de naviguer à la sonde, ce qui l'aurait aidé à s'orienter et à rester en dehors des eaux territoriales, et,

3. qu'il n'était pas entré dans les eaux territoriales pour y réparer une avarie. (Ibid., p. 155.)

The Netherland Government also stated that it could not make distinctions between intentional and nonintentional entrance. The defect in an electric compass was not considered as an evidence of distress, but as an additional reason for exercising care in navigation in order that regulations of neutrality might not be violated.

Other submarines entering Dutch territorial waters were interned.

*Radio upon vessels.*—While prizes are generally admitted to neutral ports in case of distress, distress must manifestly be of a nature reasonably to imperil the vessel. Some neutral states do allow prizes to be sequestrated pending adjudication in a belligerent court, but in Situation III entrance to the territorial sea is forbidden to all belligerent vessels except strictly private merchant vessels upon the surface. The *East Wind* in charge of a prize crew would not be a strictly private merchant vessel nor would the fact that its radio was disabled constitute such a condition as would make the vessel so unseaworthy as to constitute distress, for vessels for many generations operated without radio. State X could not maintain that this was entrance in distress, and the authorities of D were acting within their rights in interning the prize crew and permitting repairs to the *East Wind.*

SOLUTION

(*a*) (3) The protest of state X against the action of state D in interning the prize crew on the *East Wind* and allowing repairs and release of the vessel is not valid.

(*b*) (*1*) *Supplying vessels of war at sea.*

*Supplies to vessels of war.*—During the World War, 1914–1918, the shipping of supplies from ports of the United States to vessels of war of the belligerents was often a subject of diplomatic correspondence.

As early as August 11, 1914, the matter of granting clearance from New York to the German steamship *Barbarossa* was raised. This vessel had taken on a large amount of fuel and was apparently planning to transfer a part of its cargo at sea. In the opinion of the Department of State these facts would not be sufficient for refusing clearance to the private merchant vessel.

In the case of the *Mazatlan* there was doubt as to the clearance from San Francisco. The Acting Secretary of State said on August 22, 1914, in a communication to the Secretary of Commerce:

SIR: I have the honor to acknowledge receipt of your letter of the 20th instant in which you inclose a telegram from the collector of customs at San Francisco regarding the clearance of the Mexican steamer *Mazatlan* flying the German flag and carrying a cargo of coal apparently destined to German cruisers in Pacific waters. I also acknowledge the receipt over the telephone of a further telegram from the collector stating that the acting German consul has offered to give a written guarantee that while this coal was an excess supply purchased for the *Leipzig*, the coal will be delivered in Guaymas, Mexico. The shipowner also volunteers to give bond guaranteeing the delivery of the coal at this Mexican port.

All the facts of this case before this department have been laid before the joint State and Navy neutrality board for its opinion. On the basis of that opinion the department recommends under the circumstances of this special case that the collector be instructed to give clearance to the *Mazatlan* with coal on board on condition that in addition to the written guarantee which the German consul offers to give as described in the telegram of the collector he give further written assurances (1) that the coal shipped by the *Mazatlan* will not be delivered to any German war vessel that has already received coal in the United States port since the outbreak of hostilities within three months after such receipt; and (2) that if the coal be delivered to any other German war vessel, the fact of such delivery will prevent the last-named war vessel from receiving coal in any United States port within a period of three months after said delivery.

Failing the receipt of these written assurances from the German consul it is recommended that clearance to the Steamship *Mazatlan* be denied unless the coal in question is first discharged. (1914, For. Rel. Sup; p. 617.)

*Suspected cargoes.*—These and other somewhat similar shipments were brought to the attention of the Department of State, and on September 19, 1914, a memorandum was transmitted to the representatives of the belligerent Governments setting forth the general rules which the Government would follow in dealing "with cases of merchant vessels suspected of carrying supplies to belligerent warships from American ports."

[*Memorandum of the Department of State with reference to merchant vessels suspected of carrying supplies to belligerent vessels, September 19, 1914*]

1. A base of operations for belligerent warships is presumed when fuel or other supplies are furnished at an American port to such warships more than once within three months since the war began, or during the period of the war, either directly or by means of naval tenders of the belligerent or by means of merchant vessels of belligerent or neutral nationality acting as tenders.

2. A common rumor or suspicion that a merchant vessel laden with fuel or other naval supplies intends to deliver its cargo to a belligerent warship on the high seas, when unsupported by direct or circumstantial evidence, imposes no duty on a neutral government to detain such ships even for the purpose of investigating the rumor or suspicion, unless it is known that the vessel has been previously engaged in furnishing supplies to a belligerent warship.

3. Circumstantial evidence, supporting a rumor or suspicion that a merchant vessel intends to furnish a belligerent warship with fuel or other supplies on the high seas, is sufficient to warrant detention of the vessel until its intention can be investigated in the following cases:

(*a*) When a belligerent warship is known to be off the port at which the merchant vessel is taking on cargo suited for naval supplies or when there is a strong presumption that the warship is off the port.

(*b*) When a merchant vessel is of the nationality of the belligerent whose warship is known to be off the coast.

(*c*) When a merchant vessel, which has, on a previous voyage between ports of the United States and ports of other neutral states, failed to have on board at the port of arrival a cargo consisting of naval supplies shipped at the port of departure, seeks to take on board a similar cargo.

(*d*) When coal or other supplies are purchased by an agent of a belligerent government and shipped on board a merchant vessel

which does not clear for a port of the belligerent but for a neighboring neutral port.

(*e*) When an agent of a belligerent is taken on board a merchant vessel having a cargo of fuel or other supplies and clearing for a neighboring neutral port.

4. The fact that a merchant vessel, which is laden with fuel or other naval supplies, seeks clearance under strong suspicion that it is the intention to furnish such fuel or supplies to a belligerent warship is not sufficient ground to warrant its detention, if the case is isolated and neither the vessel nor the warship for which the supplies are presumably intended has previously taken on board similar supplies since the war began or within three months during the period of the war.

5. The essential idea of neutral territory becoming the base for naval operations by a belligerent is repeated departure from such territory by a naval tender of the belligerent or by a merchant vessel in belligerent service which is laden with fuel or other naval supplies.

6. A merchant vessel, laden with naval supplies, clearing from a port of the United States for the port of another neutral nation, which arrives at its destination and there discharges its cargo, should not be detained if, on a second voyage, it takes on board another cargo of similar nature.

In such a case the port of the other neutral nation may be a base for the naval operations of a belligerent. If so, and even if the fact is notorious, this Government is under no obligation to prevent the shipment of naval supplies to that port. Commerce in munitions of war between neutral nations cannot as a rule be a basis for a claim of unneutral conduct, even though there is a strong presumption or actual knowledge that the neutral state, in whose port the supplies are discharged, is permitting its territory to be used as a base of supply for belligerent warships. The duty of preventing an unneutral act rests entirely upon the neutral state whose territory is being used as such a base.

In fact this principle goes further in that, if the supplies were shipped directly to an established naval base in the territory or under the control of a belligerent, this Government would not be obligated by its neutral duty to limit such shipments or detain or otherwise interfere with the merchant vessels engaged in that trade. A neutral can only be charged with unneutral conduct when the supplies, furnished to a belligerent warship, are furnished directly to it in a port of the neutral or through naval tenders or merchant vessels acting as tenders departing from such port.

7. The foregoing propositions do not apply to furnishing munitions of war included in absolute contraband, since in no event can a belligerent warship take on board such munitions in neutral waters, nor should it be permitted to do so indirectly by means of naval tenders or merchant vessels acting as such tenders. (Department of State, September 19, 1914.)

*The "Locksun," 1914.*—The German cruiser *Geier* entered the port of Honolulu for repairs in October, 1914. About the same time the steamer *Locksun* arrived. The Acting Secretary of State sent the following communication to the German ambassador on November 7, 1914, after the *Geier* had had a reasonable opportunity to make repairs:

My Dear Mr. Ambassador: Referring to my previous communication to you of October 30 regarding the internment of the German cruiser *Geier*, the department is now in possession of information that the German steamship *Locksun*, belonging to the Norddeutscher Lloyd Co., cleared August 16, 1914, from Manila with 3,215 tons of coal for Menado, in the Celebes; that she coaled the German warship *Geier* in the course of her voyage toward Honolulu, where she arrived soon after the *Geier;* that the *Locksun* received coal by transfer from another vessel somewhere between Manila and Honolulu; and that the captain stated that he had on board 245 or 250 tons of coal when he entered Honolulu, whereas investigation showed that he had on board approximately 1,600 tons.

From these facts the department is of the opinion that the operations of the *Locksun* constitute her a tender to the *Geier*, and that she may be reasonably so considered at the present time. This Government is therefore under the necessity of according the *Locksun* the same treatment as the *Geier*, and has taken steps to have the vessel interned at Honolulu if she does not leave immediately. (1914, For. Rel. U. S., Sup., p. 587.)

These vessels were interned November 12, 1914.

On November 11, 1914, the German ambassador had requested information as to under what rule the *Locksun* had been detained, saying:

The *Locksun* can not be considered as a man-of-war, not even as an auxiliary ship, but is a simple merchant ship. As to the alleged coaling of H. M. S. *Geier* from the *Locksun*, the neutrality regulations of the United States only provide that a vessel can

be prevented from taking coal to a warship for a period of three months after having left an American port. As the *Locksun* left the last American port (Manila) on August 16 she ought to be free on November 16. (1914, For. Rel. U. S., Sup., p. 588.)

To this the counselor for the Department of State replied on November 16, 1914:

My Dear Mr. Ambassador: In reply to your note of the 11th instant, inquiring on which rule or regulation the internment of the German ship *Locksun* is based, I would advise you that the *Locksun* has been interned on the principle that she has been acting as a tender to the German warship *Geier*, as the facts set forth in my note of the 7th instant substantiate. If, under the circumstances, the *Locksun* has been in fact a tender to the *Geier*, the question involved does not relate to the amount of coal which either the Locksun or the Geier has taken on within three months, but rather relates to the association and cooperation of the two vessels in belligerent operations. The *Locksun*, having been shown to have taken the part of a supply ship for the *Geier*, is, in the opinion of this Government, stamped with the belligerent character of that vessel, and has really become a part of her equipment. In this situation it is difficult to understand on what basis it would have been possible to distinguish between the two vessels, so as to intern the one and not the other. This Government, therefore, has taken what appears to it to be the only reasonable course, under the circumstances, and directed that both vessels be interned. (Ibid., p. 589.)

*The "Berwind," 1914.*—Neutral merchant vessels did apparently carry supplies to vessels of war. While there was not entire agreement on the facts, the case of the *Berwind* is illustrative. In a note from the British ambassador to the Secretary of State on November 20, 1914, the circumstances were stated to be as follows:

Sir: Under instructions from my Government, I have the honor to bring the following matter to your notice.

The American steamer *Berwind*, with a full cargo of coal on board and under charter to the Hamburg-American Line, cleared for Buenos Aires from New York on the 5th of August last.

It is now established beyond all possible doubt that the *Berwind* in fact never did proceed to Buenos Aires; that on September 18 last she arrived in ballast at Rio de Janeiro after having coaled the German warships *Cap Trafalgar* and *Dresden;* and

that she is now again in the port of New York, having arrived there from Rio de Janeiro on the 15th instant.

In the rules issued by your department on September 19 for the guidance of United States officers in dealing with merchant vessels suspected of carrying supplies to belligerent vessels, it is stated as follows:

"3. Circumstantial evidence, supporting a rumor or suspicion that a merchant vessel intends to furnish a belligerent warship with fuel or other supplies on the high seas, is sufficient to warrant detention of the vessel until its intention can be investigated in the following cases:

"(c) When a merchant vessel, which has on a previous voyage between ports of the United States and ports of other neutral states failed to have on board at the port of arrival a cargo consisting of naval supplies shipped at the port of departure, seeks to take on board a similar cargo."

Under instructions from Sir E. Grey I have the honor to request that in the event of the *Berwind* preparing to put to sea again with supplies or fuel on board, she may be detained in port in accordance with the rules quoted above. (1914 For. Rel., Sup., p. 633.)

This matter was by the Secretary of State brought to the attention of the Attorney General with a view to preventing "the *Berwind* or its owner from again using the ports of the United States as a point of departure of cargoes of coal or supplies for war vessels of the belligerents at sea in such manner as to constitute United States ports as bases of supplies for such armed vessels."

*Supplies to vessels at sea.*—Referring to Article 7 of Hague Convention No. XIII which states that—

> A neutral power is not bound to prevent the export or transit, for the use of either belligerent, of arms, munitions, or, in general, of anything which could be of use to an army or fleet. (1908, N. W. C. Int. Law Situations, pp. 188, 190),

and to the embodiment of the principle in American statements, the German Government indicated that the conduct of American port officials was more favorable to one belligerent than to the other. In a German memorandum of December 15, 1914, received by the Department of

State, it was said in referring to The Hague convention and the neutrality statement:

In spite thereof, various American port authorities have denied clearance from American ports to vessels of the merchant marine seeking to convey needed supplies or fuel to German warships either on the high seas or in other neutral ports.

According to the principles of international law above cited, a neutral state need not prevent furnishing supplies of this character; nor may it, after allowing the adversaries to be furnished with contraband, either detain or disable a merchant ship carrying such a cargo. Only if contraband trade should turn the ports into bases of German military operations, would the unilateral stoppage of the trade of those vessels become a duty. Such, perhaps, would become the case if German coal depots were established in the ports, or if the vessels called at a port in regular voyages on the way to German naval forces. But it stands to reason that an occasional sailing of one merchant vessel with coal or supplies for German warships does not turn a neutral port into a German base in violation of neutrality.

Our enemies draw from the United States contraband of war, especially arms, worth several billions of marks. This in itself they are authorized to do. But if the United States prevents our warships from occasionally drawing supplies from its ports, a great injustice grows out of the authorization, for it would amount to an unequal treatment of the belligerents and constitute a breach of the generally accepted rules of neutrality to Germany's detriment. (1914, For. Rel., Sup., p. 647.)

This communication received consideration, and on December 24, 1915, a reply was made in which attention was called to articles 18 to 20 of Hague Convention XIII.

ARTICLE 18

Belligerent warships may not make use of neutral ports, roadsteads, or territorial waters for replenishing or increasing their supplies of war material or their armament, or for completing their crews.

ARTICLE 19

Belligerent warships may only revictual in neutral ports or roadsteads to bring up their supplies to the peace standard.

Similarly these vessels may only ship sufficient fuel to enable them to reach the nearest port in their own country. They may, on the other hand, fill up their bunkers built to carry fuel, when in

neutral countries which have adopted this method of determining the amount of fuel to be supplied.

If, in accordance with the law of the neutral power, the ships are not supplied with coal within 24 hours of their arrival, the permissible duration of their stay is extended by 24 hours.

ARTICLE 20

Belligerent warships which have shipped fuel in a port belonging to a neutral power may not within the succeeding three months replenish their supply in a port of the same power. (1908 N. W. C., Int. Law Situations, p. 218.)

The reply stated:

Complaint, however, appears to be made by the Imperial German Government of the refusal of clearance by American authorities to merchant vessels intending to furnish fuel and supplies to German warships on the high seas or in neutral ports.

In reply I desire to call to your attention that the Government is not aware that any merchant vessel has been refused a clearance on these grounds during the present war, although certain temporary detentions have been found to be necessary for the purpose of investigating the bona fides of the alleged destinations of particular vessels and the intentions of their owners or masters. This has been done in an effort to carry out the principles of international law and the declarations of treaties with respect to coal supplies for belligerent warships and the use of neutral ports as bases of naval operations. Although as a rule there is on the part of the nationals of neutral countries entire freedom of trade in arms, ammunition, and other articles of contraband, nevertheless the Imperial German Government will recall that international law and the treaties declaratory of its principles make a clear distinction between ordinary commerce in contraband of war and the occasional furnishing of warships at sea or in neutral ports. In this relation I venture to advert to articles 18 to 20, inclusive, of Hague Convention XIII, 1907. From these articles it will be observed that a warship which has received fuel in a port belonging to a neutral power may not within the succeeding three months replenish her supply in a port of the same power. It is, I am sure, only necessary to call your attention to these articles to make it perfectly clear that if a number of merchant vessels may at short intervals leave neutral ports with cargoes of coal for transshipment to belligerent warships at sea, regardless of when the warships last received fuel in the ports of the same neutral power, the conventional prohibition would be nullified, and the three months' rule rendered useless. By such a practice a warship might remain on its station

engaged in belligerent operations without the inconvenience of repairing to port for fuel supplies. (1914, For. Rel., Sup., p. 648.)

*German doctrine as to base.*—The German Government in 1914 regarded the American practice as to clearance of vessels loaded with fuel and other supplies necessary for vessels of war as "untenable in international law." In a memorandum of December 15, 1914, it was said (see Ante, p. 133):

> According to the principles of international law above cited, a neutral state need not prevent furnishing supplies of this character; nor may it, after allowing the adversaries to be furnished with contraband, either detain or disable a merchant ship carrying such a cargo. Only if contraband trade should turn the ports into bases of German military operations, would the unilateral stoppage of the trade of those vessels become a duty. Such, perhaps, would become the case if German coal depots were established in the ports, or if the vessels called at a port in regular voyages on the way to German naval forces. But it stands to reason that an occasional sailing of one merchant vessel with coal or supplies for German warships does not turn a neutral port into a German base in violation of neutrality. (1914 For. Rel., Sup., p. 647.)

Replying to the German objections to American delay in granting clearance, the Secretary of State said on December 24, 1914:

> Furthermore, article 5 of the same convention (Hague XIII) forbids belligerents to use neutral ports and waters as a base of naval operations against their adversaries. As stated in the department's statement on "Merchant vessels suspected of carrying supplies to belligerent vessels," dated September 19 last (a copy of which is inclosed), the essential idea of neutral territory becoming the base for naval operations by a belligerent is, in the opinion of this Government, repeated departure from such territory of merchant vessels laden with fuel or other supplies for belligerent warships at sea. (Ibid., p. 648.)

*Resolution of March 4, 1915, on bases.*—In the early period of the World War the use of neutral waters and ports as bases from which to carry on hostile operations had been discussed. To meet the problems arising, the Congress of the United States acted as follows:

*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,* That from and after the passage of this resolution, and during the existence of a war to which the United States is not a party, and in order to prevent the neutrality of the United States from being violated by the use of its territory, its ports, or its territorial waters as the base of operations for the armed forces of a belligerent, contrary to the obligations imposed by the law of nations, the treaties to which the United States is a party, or contrary to the statutes of the United States, the President be, and he is hereby, authorized and empowered to direct the collectors of customs under the jurisdiction of the United States to withhold clearance from any vessel, American or foreign, which he has reasonable cause to believe to be about to carry fuel, arms, ammunition, men, or supplies to any warship, or tender, or supply ship of a belligerent nation, in violation of the obligations of the United States as a neutral nation.

In case any such vessel shall depart or attempt to depart from the jurisdiction of the United States without clearance for any of the purposes above set forth, the owner or master or person or persons having charge or command of such vessel shall severally be liable to a fine of not less than $2,000 nor more than $10,000, or to imprisonment not to exceed two years, or both, and, in addition, such vessel shall be forfeited to the United States.

That the President of the United States be, and he is hereby, authorized and empowered to employ such part of the land or naval forces of the United States as shall be necessary to carry out the purposes of this resolution.

That the provisions of this resolution shall be deemed to extend to all land and water, continental or insular, within the jurisdiction of the United States.

Approved, March 4, 1915. (38 U. S. Stat., Pt. I, p. 1226.)

*The "Farn," 1915.*—The question of the status of a vessel captured by a belligerent while it was lawfully flying the flag of its enemy has arisen in varying forms. When such a vessel enters a neutral port it is evident that the de facto authority in control must be recognized, otherwise the legality of the capture or other aspects of the captor's conduct would be brought into question. It has sometimes been maintained that prize decision is necessary before the neutral may lawfully recognize the captor's authority. Some of these questions were raised

in 1915 in regard to the *Farn* and the Secretary of State in a letter to the British Ambassador said:

WASHINGTON, *March 13, 1915.*

EXCELLENCY: I have the honor to acknowledge the receipt of your excellency's note of the 26th ultimo in relation to the steamship *Farn*, or *KD–3*, which has been interned in the port of San Juan, P. R., as a tender to a belligerent fleet. The department is advised that the *Farn* left Cardiff about September 5, 1914, for Montevideo, with a clause in her charter to deliver coal to warships if they so desired. Though, as you state, the vessel was not employed as a collier, or otherwise, in the Admiralty service, this fact would not in the opinion of the department affect her status at the time of internment if she indeed acted as a collier or auxiliary to a belligerent fleet. It is understood that the *Farn* was a British merchant vessel; that she had on board a cargo of Cardiff coal amounting to some 3,000 tons; that she was captured by the German cruiser *Karlsruhe* on October 5; that the cruiser placed a prize crew and officers on board; and that notwithstanding the known practice of the *Karlsruhe* to sink her enemy prizes, the vessel had been at sea continuously since the date of capture until she put into the port of San Juan on January 12 last, for provisions and water. The department believes that the only reasonable conclusion in the circumstances is that between October 5 and January 12 the *Farn* was used as a tender to German warships. It appears obvious that a belligerent may use a prize in its service and that the prize thereby becomes stamped with a character dependent upon the nature of the service. It is upon this view of the case that the United States Government concluded to treat the vessel as a tender, which character accords with her presumed service to the German fleet.

Your excellency states that it would be necessary before the vessel could be treated as a German fleet auxiliary that she should have been condemned by a competent prize court. With this conclusion the Government of the United States is under the necessity of disagreeing. In the opinion of this Government an enemy vessel which has been captured by a belligerent cruiser becomes, as between the two governments, the property of the captor without the intervention of a prize court. If no prize court is available, this Government does not understand that it is the duty of the captor to release his prize, or to refuse to impress her into its service. On the contrary, the captor would be remiss in his duty to his government and to the efficiency of its belligerent operations if he released an enemy vessel because he could not take her in for adjudication.

As to article 21 of The Hague Convention No. XIII of 1907, cited by your excellency as prescribing the treatment to be accorded to the *Farn*, it is only necessary to state that as it appears that His Majesty's Government has not ratified this convention, it should not be regarded as of binding effect between Great Britain and the United States.

In this relation I venture to call to your attention that the British consul at San Juan protested on January 12 against the clearance of the *Farn*, and that your excellency in your note of January 13 requested that she be detained in the interest of neutrality. It was not until January 17 that your excellency informed the department that His Majesty's Government presumed that the United States would act under article 21 of Hague Convention No. XIII of 1907 in regard to the release of the vessel. Sufficient time had thus elapsed to allow for communication with British warships and their appearance off the port of San Juan. The result of releasing a German prize loaded with coal at this juncture needs no comment.

In the circumstances the Government of the United States is under the necessity of adhering to its decision to intern until the end of the war the steamship *Farn* as a fleet auxiliary.

I have, etc.,

ROBERT LANSING
(*For the Secretary of State*).

(1915 For. Rel., Sup., p. 823.)

*Supplies to vessels of war at sea.*—From time to time during the World War vessels of war were off the coast of the United States and in need of fuel or other supplies. Questions arose as to whether it would be permissible for neutral or belligerent private vessels to transport such supplies to the vessels of war under the rule forbidding belligerents to use neutral ports and waters as a base of naval operations. The Acting Secretary of State, in a letter to the German ambassador, April 10, 1915, said:

The reasons for this rule are evident when its application is considered. In the first place, as only sufficient coal and supplies may be furnished a warship to enable it to reach its nearest home port, neutrals must, in order to determine the amount, be specifically advised of the size of the vessel, the number of the crew, the amount of fuel and supplies already on board, and the place

of transshipment. Without knowledge of these facts it would be impossible to limit the cargo of a vessel so that the warship could not take on board more coal or supplies than the rule of international law permits. In the second place, after the departure of a supply boat from the jurisdiction of the United States, this Government would have no control over the vessel to prevent delivery to a different warship from the one supposed to be entitled to replenishment, even though the supplies furnished far exceeded the amount permitted by international law. In the third place, as a belligerent warship may not, in any event, supply itself in the ports of a neutral power more than once in three months, a neutral government, before allowing coal and supplies to be taken to a belligerent warship from its ports, should be satisfied that none had been obtained by the same vessel within the preceding three months. This information can be had only from the warship itself, unless it has during the period entered a neutral port, or been in direct communication therewith. In any event, the amount of the stores to be supplied, and the time when they may properly be furnished are questions of fact, and not matters of presumption.

Furthermore, the allowance of coal and supplies by a neutral to a belligerent warship is based on the presumption that the latter intends to return to its home port. There can, however, be no such presumption in the present case. In fact, the presumption is that no German warship would attempt to return home when there is a virtual investment of German ports by hostile naval forces. On the contrary, it may be assumed with reasonable certainty that a German warship which remains on the high seas, proposes to take supplies in order to continue hostile operations against vessels of belligerent nationality and to intercept and search neutral vessels. If, therefore, such a warship is supplied with an amount of coal and supplies in excess of the amount permitted by law, the neutral territory from which such stores are derived would clearly constitute a depot for the projection of the naval operations of a belligerent in contravention of the rules of international law and article 5 of Hague Convention No. XIII of 1907. (1915 For. Rel., Sup., p. 862.)

SOLUTION

(*b*) (1) The protest of state Y against the furnishing of fuel and provisions within a period of three months in state E to the *Athens* is valid.

(*b*) (*2*) *Control of radio.*

*Hague Convention V, 1907.*—Hague Convention V, 1907, is concerned with the rights and duties of neutral States in case of war on land. The report of the second commission of the second Hague peace conference, the committee charged with the investigation of this subject in articles 3, 8, and 9 touches upon the use of wireless telegraph.

ARTICLE 3

Belligerents are likewise forbidden:

(*a*) To erect on the territory of a neutral state a wireless telegraphy station or any other apparatus for the purpose of communicating with the belligerent forces on land or sea;

(*b*) To use any installation of this kind established by them before the war on the territory of a neutral state, for purely military purposes, and which has not been opened for the service of public messages.

The provisions of this article follow directly from the principle affirmed in article 1. The inviolability of the territory of a neutral state is incompatible with the use of this territory by a belligerent in aid of any of the objects contemplated by article 3.

Here, likewise, there can be no conflict between the provisions of article 3 and those contained in article 8 below. The first of these articles contemplates the installation by belligerent parties of stations or apparatus on the territory of the neutral state or the use of stations or apparatus established by them in time of peace on this territory for purely military purposes without opening them to public service. Article 8, on the other hand, treats of public service utilities operated in a neutral country, either by the neutral state or by companies or individuals. (Reports of The Hague Peace Conferences, Carnegie Endowment, p. 539.)

ARTICLE 8

A neutral state is not called upon to forbid or restrict the use on behalf of the belligerents of telegraph or telephone cables or of wireless telegraphy apparatus belonging to it or to companies or private individuals.

Mention of this article has already been made in the commentary on article 3. We are here dealing with cables or apparatus belonging either to a neutral state or to a company or individuals, the operation of which, for the transmission of news, has the

character of a public service. There is no reason to compel the neutral state to restrict or prohibit the use by the belligerents of these means of communication. Were it otherwise, objections of a practical kind would be encountered, arising out of the considerable difficulties in exercising control, not to mention the confidential character of telegraphic correspondence and the rapidity necessary to this service.

Through His Excellency Lord Reay, the British delegation requested that it be specified that "the liberty of a neutral state to transmit messages by means of its telegraph lines on land, its submarine cables, or its wireless apparatus does not imply that it has any right to use them or permit their use in order to render manifest assistance to one of the belligerents."

The justice of the idea thus stated was so great as to receive the unanimous approval of the commission.

ARTICLE 9

Every measure of restriction or prohibition taken by the neutral state in regard to the matters referred to in articles 7 and 9 must be impartially applied by it to both belligerents.

A neutral state must see to the same obligation being observed by companies or private individuals owning telegraph or telephone cables or wireless telegraphy apparatus.

While declaring that a neutral state does not have to forbid or restrict either the commercial operations referred to in article 7, or the use of the cables or apparatus mentioned in article 8, the project does not, needless to say, detract from the right of the said neutral state to take, on its own account, such restrictive or prohibitive measures in these matters as it may deem necessary or useful. Its liberty in this respect remains entire, with but one condition, namely, that the measures so taken be applied impartially to the belligerents. (Ibid., p. 543.)

*Control of radio, 1914.*—As a result of diplomatic interchange of notes in regard to the use of radio, President Wilson by Executive Order No. 2042 of September 5, 1914, prohibited the stations within the jurisdiction of the United States "from transmitting or receiving for delivery messages of an unneutral nature and from in any way rendering to any one of the belligerents any unneutral service." Accordingly he authorized the taking over by the Government of "one or more of the high-powered radio stations within the jurisdiction of the

United States and capable of trans-Atlantic communication." The Secretary of the Navy was authorized to enforce this order. For this purpose detailed instructions were drawn up in late September limiting communication to shore stations in Europe and in the United Kingdom and to neutral messages which should be intelligible to the American officials. On November 7, 1914, the Navy Department proposed to substitute the following:

1. Radio messages containing information relating to the location or movements of armed forces of any belligerent nation, or relating to material or personnel of any belligerent nation, will be considered as unneutral in character and will not be handled by radio stations under the jurisdiction of the United States, except in the case of cipher messages to or from United States officials.

2. No cipher or code messages are permitted to be transmitted to radio ship stations of belligerent nations by any radio shore station situated in the United States or its possessions or in territory under the jurisdiction of the United States. Similar messages received by such radio stations from ships of belligerent nations will not be forwarded or delivered to addressee.

3. No communication of any character will be permitted between any shore radio station under the jurisdiction of the United States and warships of belligerent nations, except calls of distress, messages which relate to the weather, dangers of navigation or similar hydrographic messages relating to safety at sea.

4. No cipher or code radio message will be permitted to be sent from or received at any radio station in the United States via any foreign radio station of a belligerent nation, except from or at certain stations directly authorized by the Government to handle such messages. Press items in plain language relating to the war, with the authority cited in each item, will be permitted between such stations, provided no reference is made to movements or location of war or other vessels of belligerents.

5. No radiogram will be permitted to be transmitted from any shore radio station situated in the United States or under its jurisdiction to any ship of a belligerent nation or any shore radio station that in any manner indicates the position or probable movements of ships of any belligerent nation. Similar radiograms in the reverse direction will not be forwarded for delivery.

6. Code or cipher messages are permitted between shore-radio stations entirely under the jurisdiction of the United States and between United States shore stations and United States or neutral merchant vessels, provided they are not destined to a belligerent subject and contain no information of any unneutral character, such as the location or movements of ships of any belligerent nations. In such messages no code or cipher addresses will be allowed and all messages must be signed with the sender's name. Radio-operating companies handling such messages must assure the Government censor as to the neutral character of such messages. Such messages, both transmitted and received, must be submitted to the censor at such times as he may designate, which will be such that will not delay their transmission.

7. In general, censoring officials will assure themselves beyond doubt that no message of any unneutral character is allowed to be handled.

8. In order to insure that censors may, in all cases, be informed thoroughly and correctly as to the contents of radio messages coming under their censorship, they will demand, when necessary, that such messages be presented for their ruling in a language that is understandable to them.

9. At such radio stations where the censor is not actually present at the station when messages are received by the radio station for forwarding, either by radio or other means, messages may pass, provided they are unmistakably of a neutral character, without being first referred to the censor, but the operating company will be held responsible for the compliance by their operators with these instructions. (1914, For. Rel., Sup., p. 680.)

To these regulations the State Department had no objection.

The United States advised Liberia to take action in accord with the American Executive order and thus maintain neutrality.

Sir Edward Grey later communicated in a note the opinion of the British Government.

I have had the honor of receiving your note of the 14th instant, submitting for the consideration of His Majesty's Government alternative proposals as to the transmission of telegraphic correspondence subject to censorship between the various belligerent governments and their respective embassies in the United States.

I shall be glad if your excellency will inform your Government that of the two alternatives proposed, His Majesty's Government would prefer the adoption of the first, namely, that the

wireless stations of Sayville and Tuckerton should be made available for the transmission of the telegraphic correspondence between the belligerent governments and their embassies subject to strict censorship by the United States authorities.

His Majesty's Government does not regard it as practicable for German and Austro-Hungarian Government messages to be allowed to pass over British and French cables.

His Majesty's Government trusts the United States Government will agree with them that it is an essential part of the duties of the censor to paraphrase all messages of belligerent governments and their embassies in order to prevent, if possible, any hidden meaning being conveyed; this process, besides being followed in the case of messages sent in plain language, should also be applied to the text of all messages intended for translation into code or cipher before being dispatched. His Majesty's Government would also urge that the working of all wireless stations should be taken out of the hands of nationals of belligerent nations.

It is presumed that the adoption of the first alternative submitted by the United States Government would not entail the prohibition of the use of cable communication in preference to wireless for the telegraphic correspondence between Department of State and His Majesty's Embassy. Such correspondence would, of course, be subject to censorship to the same extent and as the correspondence of belligerent governments conducted through wireless stations. (Ibid., 677.)

*Attitude of United States on radio.*—The radio stations at Sayville, Long Island, and at Tuckerton, N. J., were in the early days of the World War able to communicate with Berlin and with German vessels of war at sea. Such use was protested by the British and on August 5, 1914, the following Executive order was issued:

Whereas proclamations having been issued by me declaring the neutrality of the United States of America in the wars now existing between various European nations; and

Whereas it is desirable to take precautions to insure the enforcement of said proclamations in so far as the use of radio communication is concerned;

It is now ordered, by virtue of authority vested in me to establish regulations on the subject, that all radio stations within the jurisdiction of the United States of America are hereby prohibited from transmitting, or receiving for delivery, messages of an unneutral nature, and from in any way rendering to any

one of the belligerents any unneutral service during the continuance of hostilities.

The enforcement of this order is hereby delegated to the Secretary of the Navy who is authorized and directed to take such action in the premises as to him may appear necessary.

This order to take effect from and after this date.

WOODROW WILSON.

THE WHITE HOUSE,
*August 5, 1914.*

The Secretary of the Navy in a circular telegram of August 8, 1914, instructed naval officers in regard to carrying out the Executive order.

No cipher or code messages permitted to be handled with radio ship or shore stations of belligerent nations by any government or commercial radio station under jurisdiction of United States nor permitted to be sent from any radio station in United States via foreign radio stations if destined to belligerent. Radio messages containing information relative to operations, material, or personnel of armed forces of any belligerent nation will be considered unneutral in character and will not be handled except in case of cipher messages to or from United States officials. In general censoring, official will assure himself beyond doubt that no message of unneutral character is handled. Censors will demand, if necessary, that messages be presented for their ruling in a language that is understandable to them. In case of doubt as to character of message it should be stopped and contents with full explanation of details forwarded to department (operations) by land line for instructions as to proper procedure.

DANIELS.

(Ibid. 675.)

As the submarine cables were in control of the enemies of Germany, the Secretary of State tried to devise a plan which should put communications of both belligerents on same footing and suggested to the belligerents the following alternatives:

(1) All the belligerents may send and receive wireless messages in code and cipher via Sayville and Tuckerton. The American censors at those stations receive the codes and ciphers used, in order to be able to see that the neutrality of the United States is not violated. Ciphers and codes to remain known only to the censors and the United States Government, also the contents of the messages sent; or

(2) Germany may use the English or French cables. The telegrams of all the belligerents submitted to censure as stated above. (Ibid., p. 670.)

The French and British communications to the Secretary of State on this suggestion follow:

FRENCH EMBASSY,
*Manchester, Mass., August 12, 1914.*
(Received 5.30 p. m.)

I am informed that the Federal Government is contemplating steps to suppress the supposed differential treatment now accorded by the United States Government to wireless communications and cable messages. If my information be correct, I beg your excellency to consider the radically different nature of these two sorts of communication. What my Government objected to from the start was the direct communication with the German men-of-war by which they would have been warned of the movements of the French merchantmen and men-of-war and which constituted a violation of neutrality. It is only because of the impossibility to ascertain whether messages addressed to Germany would not reach German men-of-war that my Government protested against the indiscriminate use of the Tuckerton and Sayville wireless stations. All belligerents are in that respect on an equal footing and this embassy is unable to let French men-of-war know of the movements of hostile vessels. The situation is different with cable communications, as a message forwarded that way can only reach a well-defined point. It can not be sent to any man-of-war, thus making the United States directly participant to a nonneutral act. The discrimination against Germany now supposed to exist in the United States' attitude is only apparent. It is the result of a legitimate act of war, that is, the cutting of German cables by a hostile force. It is in the order of things that the belligerent who has not been able to protect himself on that point should bear the consequences of it and it can not be the duty of a neutral power to reestablish between the belligerents a balance that has been destroyed by a legitimate act of war.

CLAUSSE.

BRITISH EMBASSY,
*Washington, August 14, 1914.*

SIR: I have the honor to recapitulate briefly the various points advanced by me in the course of conversations which I have had during the past few days with you and the Counsellor of the Department of State and in which I supported the contention of His Majesty's Government that the use of the wireless stations at

Sayville and Tuckerton for messages of an unneutral nature should not be reestablished.

1. The two wireless stations in question are under the direct control of the German Government and messages intercepted before the censorship was established indubitably show that they were in constant communication with German warships.

2. Information conveyed by wireless differs vastly from that conveyed by cable. A wireless message, from the very moment it is dispatched, is spread in countless directions and is conveyed to any number of ships over a wide area. A cable message can only be delivered at one well-known point. That point of destination is a tangible one and the enemy are at perfect liberty to attack it and cut off communications.

3. It would appear that the German Embassy contends that it is cut off entirely from communication with its Government. His Majesty's Embassy understands, however, that there are still cable routes open to them, via Italy, for instance. But even if this were not the case, the cutting of German cables is a perfectly legitimate act of war, which the German Embassy can not expect it to be the duty of a neutral to redress.

4. The further contention of the German Embassy that it is being discriminated against and that a cable message is on the same footing as a wireless message is incorrect. A cable message can not reach a warship. Any information which might be conveyed as to the movement of ships by cable takes a considerable number of hours to reach its destination. When information is ultimately sent to the ships, this information reaches them from the territory of the belligerent (by means of relays from Europe, which again take time—a matter of vital importance) and not direct from the territory of a neutral. A wireless message, on the other hand, sent from the Sayville or the Tuckerton stations is not only direct but immediate information conveyed to ships, merchantmen, and warships.

5. In short, the two German wireless stations above mentioned are in a position to impart direct and immediate information to the German fleet, to the great danger of British shipping, and render United States territory a base for direct military operations against their enemies.

I have, etc.,

COLVILLE BARCLAY.

(Ibid., pp. 671–672.)

*Use of Government radio.*—During the World War, 1914–1918, requests of private persons and of officials were received for the use of radio which was under Gov-

ernment control. Even when censorship was maintained it was not always easily possible to determine the correct course of action, but communication by neutral government radio with belligerent ships was usually prohibited. A case arising at San Juan was a subject of diplomatic correspondence in a note from the Secretary of State to the French ambassador.

WASHINGTON, *December 29, 1915.*

MY DEAR MR. AMBASSADOR: I have just received a report from the Navy Department stating that the United States naval radio station at San Juan was requested on December 7 by the French consular officer at that port to transmit a message to the French cruiser *Descartes* patrolling outside the port of San Juan. Upon the transmittal of the message being properly refused, the tug *Berwin* left the port and steamed out to the cruiser, near which she remained until after dark. The officer surmises that the French consul took this means of communicating his message to the French cruiser.

I am calling this matter to your attention informally in order to avoid, if possible, the necessity of bringing the matter to the attention of your Government in a formal manner for, as it is generally known, the Government has during the present war taken the attitude that belligerent cruisers may not use American coasts as sources of information to guide them in their belligerant operations. Such a practice would obviously transform American shores into bases of naval operations. If the facts turn out to be as I have described them, I would appreciate it if you could find it possible to have instructions issued to the commanders of French cruisers to desist from this method of obtaining information.

In this relation I desire to call your attention to a report which has been received from American authorities at San Juan that the same French cruiser has, since it arrived off the Porto Rican coasts, been very active in stopping all vessels leaving and approaching San Juan within the sight of the port, and on several occasions approaching well within the 3-mile limit, presumably for the purpose of observation. This practice, which has received the appellation of "hovering," has, as you may recall, been always regarded by this Government as inconsistent with the treatment to be expected from the naval vessels of a friendly power in time of war and as a vexatious menace to the freedom of American commerce. On account of the cordial relations existing between our Governments, I am sure that as a result of calling this matter to your attention, instructions will be issued to the French

ships to desist from a practice which is creating such a bad impression in Porto Rico and New York.

I am, etc.,

ROBERT LANSING.

(1915, For. Rel. Sup., pp. 881, 882.)

SOLUTION

(*b*) (2) The protest of state X against the toleration by state E of such use of radio by the commanding officer of the *King* is valid.

(*b*) (3) *Belligerent use of cables.*

*Cable censorship.*—Early in the World War the use of cables received attention from belligerents and from neutrals. In many businesses technical words were regularly used in time of peace in a sense that would not be clear to a person not familiar with the special business. An early telegram to the Secretary of State asks in regard to the use of the French cable between New York and Porto Rico:

HOUSTON, TEX., *August 5, 1914.*

Telegraph companies refuse to handle code messages for Porto Rico advising French cable New York to Porto Rico regulations demand plain language and full address. Must these revisions be complied with on messages from one part of United States to another? We, of course, considering Porto Rico United States territory and business in a sense interstate.

KIRBY LUMBER COMPANY.

(1914 For Rel. Sup., p. 503.)

The reply was:

DEPARTMENT OF STATE,
*Washington, August 7, 1914.*

Subject your telegram receiving attention to end that ordinary code messages between United States and Porto Rico may not be refused. Great number of questions suddenly arising out of European war require time for adjustment. You will be advised.

W. J. BRYAN.

(Ibid.)

Subsequently, September 1, 1914, advice was given that code messages would be transmitted.

The cable companies brought to the attention of officials of different governments that with the increased demand upon their lines for service the requirements imposed by censorship and other restrictions made use of the lines to maximum capacity difficult. The Western Union estimated that the requirement of full addresses and signatures might cut down the number of messages which could be transmitted by 50 per cent while doubling the cost to the public. The Department of State on September 26, 1914, telegraphed to the American ambassador in Great Britain to the following effect:

> The department has received a great many protests from commercial houses and boards of trade and transportation throughout the United States in regard to the suppression by British censors of cable communications to and from neutral countries. This considerably interferes with legitimate foreign commerce between the United States and neutral countries. You may present the matter to the British Foreign Office with the suggestion that the department deems it very desirable to discontinue suppressing harmless commercial cables. Another great hardship has been that when suppressions have been made the senders of cables have not been informed of nondelivery. This should also be remedied. The department is awaiting an early reply. (1914, For. Rel., Sup., p. 509.)

While the British Government on October 13 informed the American ambassador that instructions had been given to discontinue "the suppression of commercial telegrams between the United States and neutral countries," the censor might still pass on the bona fides of the communciation and was not under obligation to notify "the sender of nondelivery of stopped telegrams." Other states protested against the censorship, both at London and Paris. In a telegram of November 25, 1914, the American ambassador in Great Britain stated—

> Unless some understanding has been reached of which I have not been advised, British Government as a war measure has the [power] to suppress what messages it chooses that come over cables here; but criticism from many quarters is becoming so insistent that I hope some relaxing of rules will come. I am

convinced that no commercial considerations play any part in their suppression but only the autocratic methods of the War Department. (Ibid., p. 518.)

An understanding mitigating to some extent the rigors of the British censorship was reached on December 18, 1914.

*Submarine cables.*—Toward the end of the nineteenth century cable policies were in process of development in the states having possessions in different parts of the world. Easy communication was of great importance both in time of peace and in time of war. While the introduction of radio made cable communication relatively less important, the cables still served many purposes. Cables were regarded as of sufficient importance to receive much attention during the World War. Cables were lifted, diverted, and sometimes cut. Part VIII, Annex VII, of the treaty of Versailles deals with the disposition of more than 20,000 miles of submarine cables.

The early doctrine had inclined toward the exemption of cables because cables were of international utility. Gradually the necessity of censorship was recognized. Even with censorship, cables may serve as valuable means of keeping open communication upon matters not concerned directly with the war as in directing pre-war commerce.

The instructions for the Navy of the United States, June, 1917, in regard to the treatment of submarine cables were as follows:

Unless under satisfactory censorship or otherwise exempt, the following rules are established with regard to the treatment of submarine telegraph cables in time of war, irrespective of their ownership.

(*a*) Submarine telegraph cables between points in territory belonging to or occupied by the enemy or between such territory and territory of the United States are subject to such treatment as the necessities of war may require.

(*b*) Submarine telegraph cables between points in territory belonging to or occupied by the enemy and neutral territory may be interrupted within the territorial jurisdiction of the enemy or

at any point outside of neutral jurisdiction if the necessities of war require.

(*c*) Submarine cables connecting an occupied territory with a neutral territory shall not be seized or destroyed, except in the case of absolute necessity.

They must likewise be restored and compensation shall be fixed when peace is made.

(*d*) Submarine telegraph cables between two neutral territories shall be held inviolable and free from interruption. (Instructions for the Navy of the United States Governing Maritime Warfare, June, 1917, p. 20.)

*Prior discussion.*—In previous conferences at the Naval War College, as in 1904 and 1907, certain aspects of the use of submarine cables have received consideration. The regulations prescribed by belligerents during the World War were often detailed and sometimes said to be arbitrary. The United States regulations after entering the war in 1917 were very comprehensive in their restrictions. (1918 N. W. C., Int. Law Documents, pp. 172–192.) The use of submarine cables in neutral ports was usually subject to censorship and the neutral state should assume such degree of control as would assure maintenance of neutrality.

SOLUTION

(*b*) (3) The protest of state X against the toleration by state E of such use of the radio by the commanding officer of the *Prince* is valid.

The protest against the use of the submarine cable is not valid though censorship may be requested.

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